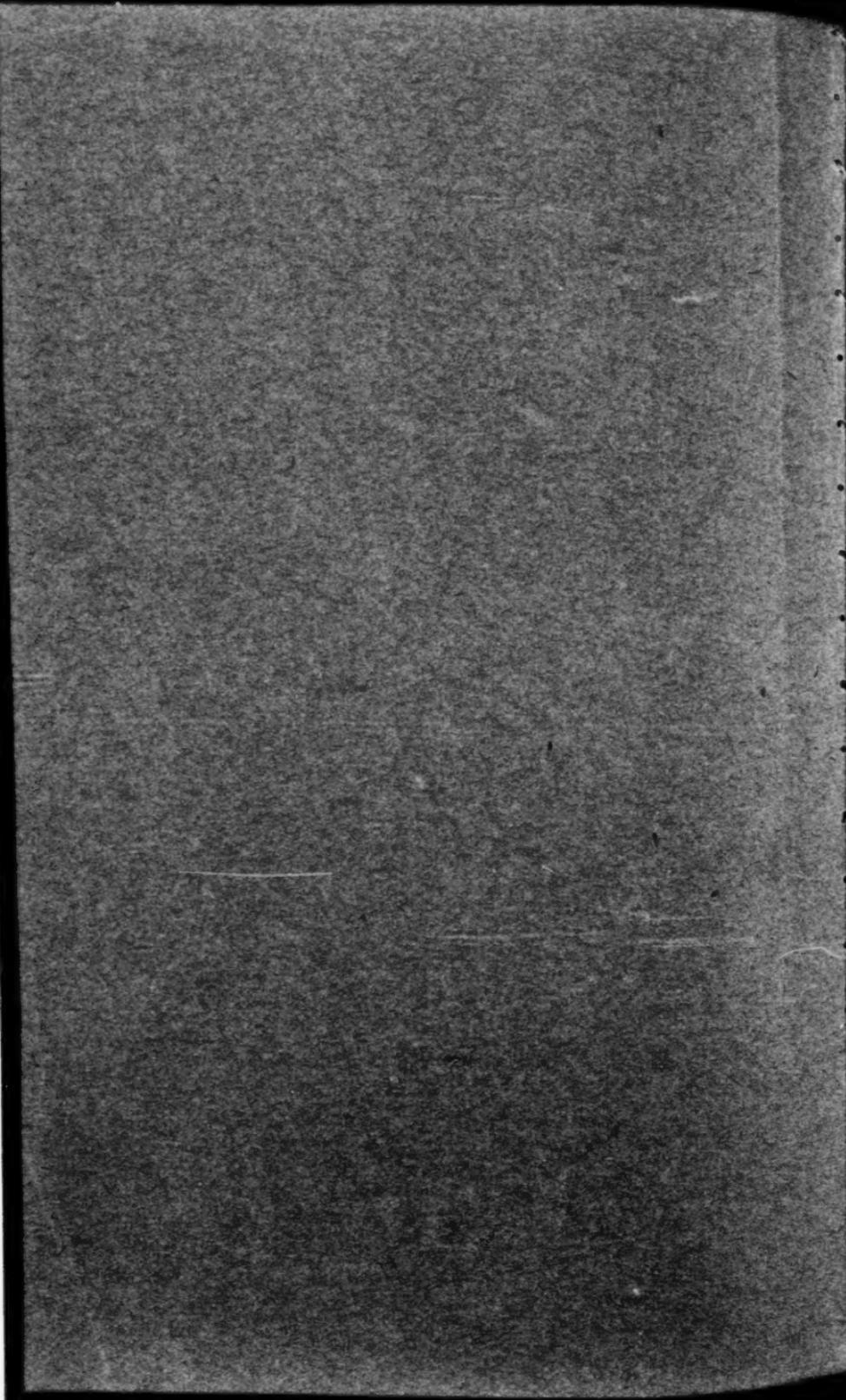


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TRANSCRIPT OF RECORD

RECORDED IN THE OFFICE OF THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA



(30,416)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1924

No. 451

A. G. RISTY ET AL., AS COUNTY COMMISSIONERS, ET AL.,
APPELLANTS,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY
COMPANY

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the December Term, 1923, of said Court, before the Honorable William S. Kenyon, Circuit Judge, and the Honorable Jacob Trieber and the Honorable David P. Dyer, District Judges.

Attest: E. E. KOCH,
(Seal) Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that heretofore, to-wit: on the twentieth day of March, A. D. 1923, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the District of South Dakota, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain cause wherein A. G. Risty, et al., as County Commissioners, etc., et al., were Appellants and the Chicago, Rock Island and Pacific Railway Company, a corporation, was Appellee, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

(Affidavit of service of Citation.)

In the District Court of the United States, for the District of South Dakota, Southern Division.

Chicago, Rock Island and Pacific Railway Company, a corporation, Plaintiff,

No. 98. vs. In Equity.

A. G. Risty, et al, Defendants,

And

Minnehaha National Bank of Sioux Falls, South Dakota, et al, Intervening Defendants.

State of South Dakota,

County of Minnehaha—ss.

E. O. Jones, being first duly sworn, on oath deposes and says: That he is a citizen and elector of the County of Minnehaha and State of South Dakota, and that upon the 10th day of December, A. D., 1922, in the City of Sioux Falls, in said County and State, he there served the hereunto attached Citation in the above entitled cause upon the above named plaintiff, by then and there handing to and leaving with A. B. Fairbank, its solicitor, a true and correct copy of said Citation, and he knows the person so served to be the solicitor of said plaintiff in said action.

E. O. JONES.

Subscribed and sworn to before me this 12 day of December, A. D., 1922.

(Notarial Seal)

G. J. CLUTTERBUCK,
Notary Public, South Dakota.

In the District Court of the United States, for the District of South Dakota, Southern Division.

Chicago, Rock Island and Pacific Railway Company, a Corporation, Plaintiff,
No. 98. vs. In Equity.

A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock, as County Commissioners of Minnehaha County, South Dakota, Fred E. Ward, as Auditor of Minnehaha County, South Dakota, and J. O. Anderson, as Treasurer of Minnehaha County, South Dakota, Defendants,

Minnehaha National Bank of Sioux Falls, South Dakota, Sioux Falls National Bank of Sioux Falls, South Dakota, Security National Bank of Sioux Falls, South Dakota, First National Bank of Dell Rapids, South Dakota, First National Bank of Garretson, South Dakota, Savings Bank of Colton, South Dakota, Brandon Savings Bank of Brandon, South Dakota, The Rowena State Bank of Rowena, South Dakota, Minnehaha County Bank of Valley Springs, South Dakota, Farmers Bank of Humboldt, South Dakota, Dakota Trust & Savings Bank of Sioux Falls, South Dakota, Commercial & Savings Bank of Sioux Falls, South Dakota, Minnehaha State Bank of Garretson, South Dakota, Sioux Falls Savings Bank of Sioux Falls, South Dakota, H. E. Donahoe and W. G. Porter, Intervening Defendants.

United States of America to the above named Plaintiff, Chicago, Rock Island and Pacific Railway Company—
Greeting:

You are hereby notified that in a certain case in equity in the United States District Court in and for the Southern Division, District of South Dakota, wherein the Chicago, Rock Island and Pacific Railway Company, a corporation, is complainant and A. G. Risty et al., as County Commissioners of Minnehaha County, South Dakota, are defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al. are intervening defendants, an appeal has been allowed the above named defendants and intervening defendants therein to the Circuit Court of Appeals, Eighth Judicial Circuit. You are hereby cited and admonished to be and appear at said Court at the City of St. Paul in the State of Minnesota sixty days after the date of this citation, to show cause, if any there be, why the order and decree appealed from should not be corrected, and speedy justice done the parties in that behalf.

Witness the Honorable James D. Elliott, Judge of the United States District Court for the Southern Division, District of South Dakota, this 25 day of November, 1922.

JAS. D. ELLIOTT, Judge.

Service of the foregoing Citation, by receipt of copy, at Sioux Falls, South Dakota, is hereby admitted this day of, A. D., 1922.

Solicitor for Chicago, Rock Island & Pacific Railway Company, Plaintiff.

Endorsed: Filed in the District Court on Dec. 13, 1922, at 2 P. M.

5 In the District Court of the United States of America, in and for the District of South Dakota, Southern Division.

Chicago, Rock Island & Pacific Railway Company, Plaintiff, No. 98 S. D. vs. In Equity.

A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock, as County Commissioners of Minnehaha County, South Dakota, Fred E. Ward, as Auditor of Minnehaha County, South Dakota, and J. O. Anderson, as Treasurer of Minnehaha County, South Dakota, Defendants.

Be It Remembered, that on the 25th day of July, A. D. 1921, there was filed in the above entitled court, on behalf of the plaintiff, a Bill in Equity; which said Bill in Equity, excluding the verification and Exhibit A, is in words and figures the following, to-wit:

6 (Bill of Complaint.)

In the District Court of the United States, for the District of South Dakota, Southern Division.

The Chicago, Rock Island and Pacific Railway Company, a Corporation, Plaintiff,

vs.

A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler, and C. T. Charnock as County Commissioners of Minnehaha County, South Dakota; Fred E. Ward

as Auditor of Minnehaha County, South Dakota; J. O. Anderson as Treasurer of Minnehaha County, South Dakota, Defendants.

The plaintiff, a corporation of the State of Illinois and a resident and citizen of said State of Illinois, brings this its bill of complaint against A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, C. T. Charnock and G. W. Tyler as County Commissioners of Minnehaha County, South Dakota, Fred E. Ward as Auditor of Minnehaha County, South Dakota, and J. O. Anderson as Treasurer of Minnehaha County, South Dakota, all of whom are residents and citizens of the State of South Dakota, and of the Southern Division of the District of South Dakota, and respectfully shows unto the court,

I.

That the plaintiff is and was during all the times herein-after mentioned, a corporation organized and existing under and by virtue of the laws of the State of Illinois and a resident and citizen of the said State of Illinois within the meaning and intent of the laws conferring jurisdiction upon District Courts of the United States.

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II.

That the defendants, A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, C. T. Charnock and G. W. Tyler, Fred E. Ward and J. O. Anderson are each of them residents and citizens of the State of South Dakota and of the Southern Division of the District of South Dakota within the meaning and intent of the laws conferring jurisdiction upon the District Courts of the United States.

III.

That the defendants, A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson and C. T. Charnock are the duly elected, qualified and acting County Commissioners of the County of Minnehaha and State of South Dakota and constitute the Board of County Commissioners of said County of Minnehaha; that the defendant G. W. Tyler claims to be the duly elected County Commissioner of the County of Minnehaha in the place of Chris Olson who is not now acting; that the defendant Fred E. Ward is the duly elected, qualified and acting Auditor of the said County of Minnehaha and that the defendant J. O. Anderson is the duly elected, qualified and acting Treasurer of the County of Minnehaha.

IV.

That the Legislature of the State of South Dakota at the ninth session thereof enacted a purported law entitled: "An Act Providing for the Establishment, Construction and Maintenance of Drainage and Levees in Counties Whenever Such Drainage Shall be Conducted to the Public Health, Convenience or Welfare", which purported act was approved by the Governor of the State of South Dakota on March 7, 1905, and which purported act is commonly known as Chapter 98
of the Session Laws of South Dakota of 1905; that
8 [subsequently] and at its tenth session the Legislature
of the State of South Dakota re-enacted said Chapter
98 of the Session Laws of 1905 by enacting a purported law
entitled: "An Act Providing for the Establishment, Construc-
tion and Maintenance of Drainage and Levees in Counties
wherever Such Drainage Shall be Conducted to the Public
Health, Convenience or Welfare or Whenever it Shall be
Necessary or Practicable for Drainage of Agricultural
Lands", which purported law was approved by the Governor
of the State of South Dakota February 21, 1907, and which
purported law is commonly known as Chapter 134 of the Ses-
sion Laws of South Dakota of 1907; that by said Chapter 134
of the Session Laws of 1907 the Legislature of the State of
South Dakota attempted to re-enact said purported law
known as Chapter 98 of the Session Laws of 1905, together
with amendments thereto; that subsequently the Legislature
of the State of South Dakota at the Sixteenth Session thereof
re-enacted said Chapter 134 of the Session Laws of 1907 with
amendments thereto and that such re-enactment is contained
in the South Dakota Revised Code 1919, as Sections 8458 to
8491 inclusive thereof; that at the second special session of
the Legislature of the State of South Dakota, held in the
year 1920, the Legislature of said state enacted a purported
law entitled: "An Act, to Amend Sections 8464, 8471, 8472
and 8473 of the South Dakota Revised Code of 1919, Relating
to Drainage and Declaring an Emergency", said purported
law being Chapter 46 of the Laws of the Second Special Ses-
sion of the Legislature of the State of South Dakota; that
copies of the purported law of the State of South Dakota
known as Chapter 98 of the Session Laws of 1905 as amended
and re-enacted as Chapter 134 of the Session Laws of 1907,
and as amended and re-enacted as Sections 8458 to 8491 of
the South Dakota Revised Code, 1919, and by the pur-
9 ported law known as Chapter 46 of the Laws of the
Second Special Session are hereby attached, marked
"Exhibit A", and made a part hereof.

V.

That prior to the year 1916 the Board of County Commissioners of the said County of Minnehaha established within said County a drainage ditch known as "Drainage Ditches No. 1 and No. 2", which drainage ditches were designed for the purpose of [graining] upwards of twenty thousand acres of agricultural land situated in Townships 101, 102, 103 and 104 North, of Range 49, West of the Fifth Principal Meridian, in the said County of Minnehaha; that said drainage ditches were established pursuant to and under the provisions of said purported Law known as Chapter 134 of the Session Laws of South Dakota of 1907, and was extended for a distance of several miles through said townships, and were fully completed prior to the year 1918; that an assessment for the cost of the construction of said drainage ditches No. 1 and No. 2 was prior to the year 1916, made upon said twenty thousand and upwards of acres of land, which assessment was paid by the owners of the land so assessed, and that all matters connected with the construction of said ditches and with the assessment of the costs thereof were fully completed prior to the year 1916; that in the proceedings above mentioned the land and property included within Drainage Districts No. 1 and No. 2 was determined by the Board of County Commissioners and the area and extent of said drainage districts was established and the land and property benefitted by said drainage ditches was finally and conclusively determined,

That none of the property of plaintiff described in the purported drainage ditch notice hereinafter referred to, of
10 which "Exhibit C" is a copy, and none of its property or rights whatsoever was included in the property assessed as aforesaid for the construction of said drainage ditches No. 1 and No. 2; that in the equalization of benefits made by said Board of County Commissioners of the said County of Minnehaha prior to the making of said assessment no part of said property and none of plaintiff's property or right whatsoever was included or found to be benefitted; that no property or rights whatsoever of the plaintiff are within the drainage district of said drainage ditches No. 1 and No. 2, and that the said defendants, the county commissioners of the said County of Minnehaha, have no power or jurisdiction to include within said drainage district any property or rights whatsoever of plaintiff or [ti] find and determine that any such property or rights have been benefitted by the construe-

tion and maintenance of said drainage ditches No. 1 and No. 2, or to assess said property or rights for any sum or sums whatsoever.

VI.

That the land drained by said drainage ditches No. 1 and No. 2 is situated in the valley of the Big Sioux River north of the city limits of the city of Sioux Falls, which city is a municipality of upwards of twenty-five thousand inhabitants; that the Big Sioux River flows in a southerly direction through said townships 101, 102 and 103 north of said Range 49, West of the Fifth Principal Meridian, and that the City of Sioux Falls is situated in said Township 101; that after entering said township 101 at the northern boundary line thereof the said Big Sioux River flows in a southerly direction to the vicinity of the southern boundary line of said township and then flows in an easterly direction for a distance of some miles and then in a northerly direction
11 through the said City of Sioux Falls and towards the north line of said township and then continues in an easterly direction until it passes out of said township over the eastern line thereof; that in its course in a northerly direction through the City of Sioux Falls the said Big Sioux River passes over a series of falls aggregating approximately ninety feet; that the city water supply of the said City of Sioux Falls is situated in a graveled bed extending over a considerable area in said townships 101 and 102 north of the city of Sioux Falls; that the South Dakota State Penitentiary is situated north of the said City of Sioux Falls, and that said penitentiary and the lands belonging thereto are situated in said townships 101 and 102.

VII.

That the Big Sioux River has its source in Lake Pelican adjoining the City of Watertown in the County of Codington and State of South Dakota, which City of Watertown is situated approximately one hundred miles north of the City of Sioux Falls; that from the said City of Watertown the said Big Sioux River flows in a generally southerly direction but with many crooks and bends through the counties of Codington, Hamlin, Brookings and Moody to the City of Sioux Falls, in the County of Minnehaha, and that the said Big Sioux River during its southward course drains a large area of territory both eastward and westward of its channel.

VIII.

That the property of the plaintiff which is described in the notice and order to show cause, of which Exhibit "C" hereto attached is a copy, consists of a right-of-way, road bed, 12 bridges and tracks entering the City of Sioux Falls from the Southeast and crossing the Big Sioux River at a point from ten to fifteen miles below any land drained by drainage ditches No. 1 and No. 2; that the plaintiff has two bridges across the Big Sioux River, both of which have been in use for a number of years and were built long prior to the construction of drainage ditches No. 1 and No. 2 or any improvements or modification thereof; that none of the property of this plaintiff is at any time subject to overflow from the Big Sioux River and that it is in no way affected or in any way benefitted by the construction of drainage ditches No. 1 and No. 2 or by the construction of the spillway, dikes and dams and gates, for the building of which the County Commissioners of Minnehaha County are now seeking to assess this plaintiff's property with benefits.

IX.

That as originally constructed said drainage ditches No. 1 and No. 2 emptied into the Big Sioux River through a ditch constructed across the land immediately north of the City of Sioux Falls, which ditch was between the City of Sioux Falls and the graveled bed from which said city obtained its water supply, and emptied into the Big Sioux River in the Northeast portion of the City of Sioux Falls and north of the series of falls situated upon said river along its course through the said City of Sioux Falls; that subsequent to the construction of said drainage ditches No. 1 and No. 2 and about the years 1915 and 1916, the volumes of water passing through said drainage ditches caused the outlet of said drainage ditches into the Big Sioux River to wash out a channel upon the land through which said outlet was constructed to such an extent that there arose imminent danger that the course 13 of the Big Sioux River would be changed so that all of the water in the channel of said river would be diverted through said drainage ditches and the outlet thereof, and a new river channel formed by said ditches which would cause the water in said river to cease flowing through its proper and natural channels and over the series of falls in the City of Sioux Falls, and to flow instead through said drainage ditches and the outlet thereto into the Big Sioux River at a point north of the City of Sioux Falls; that

such diversion of the channel of the said Big Sioux River threatened to cause enormous damage to property in the said City of Sioux Falls situated along the channel of said river, and to destroy the power obtained from said river at the falls thereof, and also to destroy the municipal water supply of the said City of Sioux Falls by draining the water from the gravel bed from which said municipal water supply is obtained.

X.

That the Board of County Commissioners of the said County of Minnehaha, for the purpose of repairing and maintaining said drainage ditches No. 1 and No. 2 in such manner as to avoid the threatened change in the channel of the Big Sioux River and to prevent the drainage of the gravel bed from which the City of Sioux Falls obtains its municipal water supply, and to prevent the injury to the property owners of the City of Sioux Falls and the destruction of the water power at the falls of the Big Sioux River in the City of Sioux Falls, which would be caused by the threatened change in the channel of the Big Sioux River caused to be constructed in the summer of the year 1916 various dams and gateways at various places along said drainage ditches No. 1 and No. 2, made changes in the

channel of the Big Sioux River along the course of said
14 drainage ditches and to reconstruct the spillway at the outlet of said drainage ditches into the Big Sioux River; that said construction work was not done for the purpose of draining lands in addition to the lands theretofore found to be benefitted by and assessed for the cost of the installation and construction of said drainage ditches Nos. 1 and 2, but for the sole and only purpose of maintaining said drainage ditches No. 1 and No. 2 in such manner as to permit them to attempt to perform the function for which they were originally constructed without danger of damage to the property and rights theretofore threatened as hereinbefore pleaded.

XI.

That there has been expended by the Board of County Commissioners of said Minnehaha County upon the construction of ditches, dams, gate-ways and other work as aforesaid, and upon the reconstruction of said spillway upon the outlet of said Drainage Ditches No. 1 and No. 2 a sum in excess of Two Hundred Fifty-five Thousand Dollars (\$255,000.00) for which said sum the said Board of County Commissioners has issued

drainage warrants, and that there is due for principal and interest upon said warrants a sum, as plaintiff is informed and believes, in excess of three hundred thousand dollars (\$300,000.00).

XII.

That before the construction of said spillway, dams, retaining gates, and other work, and straightening of the channel of the Big Sioux River, no petition therefor signed by one or more owners of land likely to be affected was ever made or presented to the Board of County Commissioners of the said County of Minnehaha, excepting that on or about the 3rd day of August, 1916, there was filed in the office of the County Auditor of the said County of Minnehaha a purported petition signed by F. L. Blackman and other persons, which said petition purported to be a petition "to reconstruct and improve Drainage Ditches No. 1 and No. 2 in Minnehaha County, South Dakota, and to construct a new spillway and outlet to said Drainage Ditches No. 1 and No. 2, and to pay therefor by assessment upon the property, persons and corporations benefitted thereby"; that Drainage Ditches No. 1 and 2 referred to in said purported drainage notice, of which "Exhibit C" is a copy, is a combination of and is the same as drainage Ditches No. 1 and No. 2 hereinbefore referred to; that the owners of some of the property included within the drainage area of drainage ditches No. 1 and No. 2 as theretofore established as aforesaid, objected to the repair of said ditches and to the assessment of their property for the cost of said repairs and of the maintenance of said ditches, and that on account of such objection and as a mere subterfuge and for the sole and only purpose of attempting to lay a foundation authorizing the Board of County Commissioners of said Minnehaha County to change the boundaries of the drainage area or district of said drainage ditches No. 1 and No. 2, and to assess property not included within the area of said drainage ditches and not benefitted by said ditches No. 1 and No. 2, for the cost of the necessary repairs and maintenance of said ditches theretofore established, constructed and accepted, the then Board of County Commissioners of said County of Minnehaha, caused the said purported petition hereinbefore in this paragraph referred to, to be filed, and that said Board of County Commissioners acquired by the filing of said petition no power or jurisdiction under and by virtue of the drainage laws of the State of South Dakota hereinbefore referred to, to proceed in any manner to include any of the property or rights of plaintiff within the drainage area or

district of said Ditches No. 1 and No. 2 or of said Ditch No. 1 and 2 and that said Board and the said defendants now constituting said Board never acquired and have no power
16 or jurisdiction to determine that any of the property or rights of plaintiff are benefitted by said drainage ditches Nos. 1 and 2, now attempted to be designated drainage ditch Nos. 1 and 2, or to assess said property or rights, or any portion thereof, for the cost of the necessary repairs and maintenance of said drainage ditches No. 1 and No. 2; that upon the filing of said purported petition the County Commissioners of said County of Minnehaha did not transmit a copy of the same to the State Engineer of the State of South Dakota; that the said Board of County Commissioners of the said County of Minnehaha did not inspect the proposed route of said drainage ditches and did not cause a survey of said drainage ditches to be made by a surveyor; that no survey of the same was ever made under the general supervision of the State Engineer of the State of South Dakota, or otherwise prior to the construction thereof; that no surveyor's report in writing was made to the said Board of County Commissioners; that no surveyor's report, or copy of any map or plan made or filed by said surveyor was furnished to the said State Engineer prior to the beginning of said work; that the said Board of County Commissioners of said Minnehaha County did not file with the said purported petition its determination of its costs, length and width of the drainage improvement furnished in said petition; that the said Board of County Commissioners did not fix a time and place for a hearing of said petition and did not give notice thereof in the manner provided by law; that none of the proceedings of the said Board of County Commissioners in the matter of the drainage petition has been recorded and indexed in any book kept for that purpose in the office of the Auditor of said County of Minnehaha; that no drainage district for the purpose
17 of the construction of said spillway, dams, retaining gates, ditches and other work has ever been constructed or established other than the drainage districts No. 1 and 2 set out in Paragraph Five of this bill, in which districts no property of the plaintiff was at any time included.

XIII.

That prior to the reconstruction of said spillway, dams, retaining gates, ditches and other work, the said Board of County Commissioners of Minnehaha County did not prepare plans and specifications therefor, and did not file plans or specifications therefor in the office of the County Auditor of

the said County of Minnehaha, and did not let contracts upon competitive bids for the construction of said spillway, dams, retaining gates, ditches and other work; that prior to the construction of said spillway the said Board of County Commissioners did advertise for competitive bids for the construction of the spillway in accordance with certain plans therefor; that bids were received by the said Board of County Commissioners for the construction of a spillway in accordance with such plans, and that the same were rejected by the said Board of County Commissioners, and subsequently the said Board of County Commissioners adopted a new and amended plan for the construction of an entirely different form of spillway, and without advertising for bids for such construction made a contract for the construction of said spillway in accordance with said new and amended plans with the Sioux Falls Construction Company, under which said contract the said Sioux Falls Construction Company constructed such spillway upon the

cost plus plan; that under said contract the said Sioux Falls Construction Company was paid the entire cost

18 of the construction of said spillway, together with nine per cent (9%) of the total cost added; that the cost of the construction of said spillway under said cost plus plan was, as plaintiff is informed and believes, upwards of one hundred fifty thousand dollars (\$150,000.00) for which said sum drainage ditch warrants upon said drainage ditches No. 1 and No. 2 were issued by the said Board of County Commissioners of Minnehaha County to the said Sioux Falls Construction Company, and to other persons.

XIV.

That on or about the 20th day of November, 1920, the Board of County Commissioners of said Minnehaha County entered into a certain contract with Albert J. Chenoweth and Herman Rettenhouse, co-partners as Chenoweth & Rettenhouse, whereby the said Board of County Commissioners employed the said Chenoweth & Rettenhouse to make a topographical survey showing the lands benefitted and subject to assessment for the payment of the cost of said spillway, dams, retaining gates, ditches and other work, and that by said contract the said Board of County Commissioners agreed to pay the said Chenoweth & Rettenhouse for said survey the sum of Seven thousand five hundred dollars (\$7,500.00) to be paid in drainage ditch warrants drawn on drainage ditches No. 1 and No. 2; that the said Chenoweth & Rettenhouse thereupon proceeded to make the purported survey of the lands purported to be sub-

ject to assessment for the construction of said spillway, dams, retaining gates, ditches and other work; that the said Cheno-weth & Rettenhouse made and filed a report with the said Board of County Commissioners, in which report they made a purported proposed distribution of benefits; that a copy of said proposed distribution is hereunto annexed, marked "Exhibit B" and made a part hereof.

19

XV.

That on or about the 10th day of June 1921, the said Board of County Commissioners of the said County of Minnehaha adopted a purported notice of the time and place for equalizing the proportioning of benefits for the construction of said spillway, dams, retaining gates, ditches and other work, and caused the same to be published on July 13, 1921, and on July 20th, 1921, in the Sioux Falls Daily Argus Leader, the official newspaper of the said County of Minnehaha; that a copy of said drainage notice is hereunto annexed, marked "Exhibit C"; that the proportion of benefits assessed against the plaintiff is 839.45 units, out of a proposed total of 32,549.63 units, and that upon the basis of such apportionment the assessment against plaintiff and its property will be in excess of the sum of Seven Thousand Nine Hundred Seventy-four Dollars (\$7974.00); that the said Board of County Commissioners of said Minnehaha County are threatening to and will, as plaintiff is informed and believes, unless enjoined by this court make an apportionment of benefits upon plaintiff of 839.45 units, and will make an assessment thereon against plaintiff and its property in the sum in excess of Seven Thousand Nine Hundred Seventy-four Dollars (\$7974.00) and that the defendant, Fred E. Ward, as County Auditor of the said County of Minnehaha, will spread such assessment upon the books of his office, and that the defendant, J. O. Anderson, as Treasurer of the said County of Minnehaha, will proceed to collect the same pursuant to the provisions of said purported statute, "Exhibit A".

XVI.

That the matter in controversy herein exceeds, exclusive of interest and cost, the sum or value of three thousand 20 dollars (\$3,000.00), and is the amount of said proposed assessment, to-wit: the sum in excess of Seven Thousand Nine Hundred Seventy-four Dollars (\$7974.00).

XVII.

That the costs of the Board of County Commissioners of said Minnehaha County in constructing said spillway, dams,

retaining gates, and ditches, were unauthorized under the Constitution and laws of the State of South Dakota, and that the same have never been approved by the State Engineer of the State of South Dakota; that no benefits have accrued to plaintiff or its property by the construction of said spillway, dams, retaining gates, and ditches, and by the other work done as aforesaid upon the property in the drainage area of said drainage ditches No. 1 and No. 2.

XVIII.

That the Board of County Commissioners of Minnehaha County under the drainage law and under the constitutional provisions of Sections 6, Article 21 of the State Constitution is wholly without authority, save and except to provide drainage for agricultural lands; that the improvements made and the work done were not for such purpose, nor did the plaintiff receive nor will the plaintiff receive any special benefit not shared in by the general public therefrom; that in the doing of the work and in the making of the improvements and incurring the indebtedness the Board of County Commissioners of Minnehaha County was wholly without jurisdiction and the obligations created, for the payment of which assessment is attempted to be made under the purported drainage law, are wholly void and that no assessment under the purported law of the State of South Dakota can lawfully be made or the proceeds thereof applied to the payment of said indebtedness.

21 Added to the bill of complaint by order of the court dated the 31st day of January, 1922.

That the equalization of benefits of 839.45 units out of a total number of units of 32,549.62, estimated in dollars and cents at approximately Eight Thousand Dollars (\$8,000), fixed by the Board of County Commissioners of Minnehaha County, South Dakota, on the 10th day of June, 1921, against the property of the Chicago, Rock Island & Pacific Railway Company, as above set forth, is wholly speculative, arbitrary, unjust, illegal and discriminatory and was made by the Board of County Commissioners without any reasonable or rational basis therefor, and is not in proportion to any benefits which the property of the plaintiff has received or ever can receive by reason of the rebuilding of the spillway, the cleaning out, repairing and maintaining of Drainage Ditch No. 1 and Drainage Ditch No. 2, as set forth herein; that the property of the plaintiff has not and never can be benefitted by the work performed by the Board of County

Commissioners as herein set forth, to the extent of Eight Thousand Dollars (\$8,000), or to any extent whatever, and that the assessment sought to be collected from the plaintiff, as above set forth, is out of all proportion to the assessment sought to be collected from the agricultural lands situated north of the City of Sioux Falls. That the said equalization of benefits is so arbitrary and discriminatory against the property of the plaintiff as to deprive the plaintiff of its property without due process of law and to deprive the plaintiff of the equal protection of the laws.

XIX.

That said purported statute of the State of South Dakota Exhibit "A" hereto attached, is unconstitutional and void in that the same is in violation of Section 2 of Article VI.
of the Constitution of the State of South Dakota, and
22 in that the same is in violation of the fourteenth amendment
of the Constitution of the United States; that said statute Exhibit "A" is further void and unconstitutional in that the same provides no fixed and determinable method or rule for the apportionment of benefits upon the property and property owners situated within the drainage area and especially in that said purported statute furnishes no fixed or determinable basis for the apportionment of benefits upon the property of railroad companies and other corporations and upon the property of municipal and quasi-municipal corporations and upon platted property in cities and villages, said purported law Exhibited "A" is further unconstitutional and void in that the same provides for an assessment against property without the right of the property owner to be heard thereon and without notice of any character to the property owner, that if said apportionment of benefits be made as threatened by the said Board of County Commissioners of said Minnehaha County and as is provided in said notice Exhibit "A" the same will constitute the taking of the property of plaintiff and of the other property owners affected by said notice without due process of law; that a cloud will be placed upon the title to the plaintiff's real property situated within said drainage [acre] affected by said notice Exhibited "C", and that there will result a multiplicity of suits and that plaintiff and other property owners affected will suffer irreparable injury.

Wherefore, plaintiff prays judgment that the defendants and each of them, their agents, servants, employes, attorneys and successors in office and each of them and every one

of them be forever restrained and enjoined from proceeding further in the making of an apportionment of benefits upon the property of plaintiff for the construction of said spillway, dams, retaining gates, ditches, and for the other work done, as aforesaid, by the Board of County Commissioners in the area of said drainage ditches No. 1 and No. 2, and restrained and enjoined from making any assessment upon the property of plaintiff for the cost of the construction of said spillway, dams, retaining gates, ditches and other work or any part thereof, and from proceeding in any manner under said purported statute Exhibit "A" in the construction of any work in the area of said drainage ditches No. 1 and No. 2 and from doing any act looking toward the apportionment of benefits for any work heretofore done in the area of said drainage ditches No. 1 and No. 2 and from doing any act tending towards the making of an assessment for the cost of any such work heretofore done and from in any manner proceeding under said purported law Exhibit "A" in the doing of any work heretofore done in the area of said drainage ditches No. 1 and No. 2; that the defendant, Fred E. Ward, as Auditor of the said County of Minnehaha, be forever restrained and enjoined from making any apportionment of benefits for work done, as aforesaid, in the area of said drainage ditches No. 1 and No. 2 and from making any assessment therefor, and from certifying any assessment therefor to the County Treasurer of the said County of Minnehaha: that the defendants, A. G. Risty, J. A. Jensen, C. W. Knott, Chris Olson, G. W. Tyler and C. T. Charnock, as County Commissioners of the said County of Minnehaha, and their successors in office be forever restrained and enjoined from fixing a proportion of benefits for the construction of said spillway, [deams], retaining gates and ditches upon the property of plaintiff and upon the property of the other property owners named in said notice Exhibit "C" and forever restrained and enjoined from making any assessment against plaintiff, or its property or against the property of any other property owners in the area of said drainage ditches No. 1 and No. 2 for the cost of said work; that the defendant J. O. Anderson, as Treasurer of Minnehaha County, South Dakota, and his successors in office be forever enjoined and restrained from filing any assessment and from collecting any assessment against the property of plaintiff or of the other property owners named in said notice Exhibit "C", upon any assessment for the construction of said spillway, dams, retaining gates and ditches; that the said purported statute of the

State of South Dakota, Exhibit "C" hereto, be adjudged and decreed to be unconstitutional and void; that all acts of the board of County Commissioners of the said County of Minnehaha and of the State Engineer of the State of Dakota heretofore done in connection with the construction of said spillway, dams, retaining gates and ditches be adjudged and decreed to be illegal and void; that it be adjudged and decreed that no benefits have resulted to plaintiff from the construction of said spillway, dams, retaining gates and ditches, and that no apportionment of benefits or assessments of damages ever be made against plaintiff or its property therefor.

That pending the issuance of a perpetual injunction herein this Honorable Court grant an interlocutory injunction herein restraining the defendants herein, their agents, servants and employes and each and every of them from doing any of the above mentioned acts until the final hearing herein

or until the further order of this court: that before the
25 hearing and determination of plaintiff's application
for an interlocutory injunction this Honorable Court
grant a temporary restraining order restraining the said
defendants, their agents and servants and each and every
of them from doing any of the above mentioned acts until
the hearing and determination of plaintiff's application for
an interlocutory injunction herein.

Plaintiff further prays that a subpoena of the United States of America issue out of and under the seal of this Honorable Court directed to the defendants, A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler, and C. R. Charnock, individually and as County Commissioners of the County of Minnehaha in the State of South Dakota, and to Fred E. Ward, individually and as auditor of the said County of Minnehaha, and to J. O. Anderson, individually and as Treasurer of the said County of Minnehaha, thereby commanding them and each of them on a day certain therein to be named to be and appear before this Honorable Court and then and there to answer (but not under oath, answer under oath being hereby expressly waived) all and singular, the premises and to perform and abide by such order, direction or decree as may be made in the premises, and that on final hearing hereof said order of injunction may be made perpetual.

26 Plaintiff further prays for such other and further relief as shall to [be] Court seem just and proper, and equitable and for its costs and disbursements herein.

O'BRIEN, STONE, HORNE &
STRINGER,
BOYCE, WARREN, & FAIR-
BANK,
Solicitor for Plaintiff.

A. B. Fairbank,
of Counsel.

Exhibit "BB"

Proposed Distribution of Proportional Benefits.

District or Division	Acres	Units	Percent of total.	
1. Farm lands north of City Limits and North of South Line of Sec. 12-101-50	13,271.09	10862.30	33.4%	\$103,191.85
2. City Lots and Town of Renner lying north of above line.	81.20	42.52	0.1%	403.94
3. Farm land and tracts south of above line.	2,065.23	2958.45	9.1%	28,105.28
4. City lots south of above line.	361.60	1372.52	4.2%	13,038.94
5. City of Sioux Falls.		3147.95	9.7%	29,905.52
6. Minnehaha County.		2518.36	7.7%	23,924.42
7. Township roads.		1573.98	4.8%	14,952.81
8. Railroads,		4721.91	14.5%	44,858.15
9. Northern States Power Company,		5351.63	16.5%	50,840.49
Totals.	15,722.12	32549.62	100.0%	\$309,221.40

In the above calculation the Value of One Unit is taken at \$9.50.

CHART

TOO

LARGE

FOR

FILMING

29 Endorsed: Filed in the District Court on Jul. 25,
1921, at 4:25 P. M.

30 (Order granting leave to Minnehaha National Bank of Sioux Falls et al., to intervene and be made parties defendant.)

The matter of hearing the show cause order heretofore issued out of this Court at the instance of the Minnehaha National Bank of Sioux Falls, South Dakota, et al, to the above named plaintiff and defendants in the above entitled cause, coming on regularly for hearing before this Court, at the court room thereof, in the Federal Building, in the City of Sioux Falls, South Dakota, the said plaintiff appearing by its attorneys of record, and the defendants appearing by their attorney of record, said petitioning interveners appearing by their attorneys, Porter & Bartlet, and after hearing of said matter, it is hereby

Ordered and Adjudged that the said Minnehaha National Bank of Sioux Falls, South Dakota, et al, said petitioning interveners, petition be granted, and the said Minnehaha National Bank of Sioux Falls, South Dakota, Sioux Falls National Bank of Sioux Falls, South Dakota, Security National Bank of Sioux Falls, South Dakota, First National Bank of Dell Rapids, South Dakota, First National Bank of Garretson, South Dakota, Savings Bank of Hartford, South Dakota, The Colton State Bank of Colton, South Dakota, Brandon Savings Bank of Brandon, South Dakota, Minnehaha County Bank of Valley Springs, South Dakota, the Rowena State Bank of Rowena, South Dakota, Farmers Bank of Humboldt, South Dakota, Dakota Trust & Savings Bank of Sioux Falls, South Dakota, Security Savings Bank of Sioux Falls, South Dakota, Commercial and Savings Bank of Sioux Falls, South Dakota, Sioux Falls Savings Bank of Sioux Falls, South Dakota, Minnehaha State Bank of Garretson, South Dakota, H. E. Donahoe, W. G. Porter, be and they are hereby made parties defendant to this cause of action, and they are hereby given until the 25th day of August, 1921, at Ten o'clock A. M. thereof, within which time to file their answer to plaintiff's bill of complaint herein, and to make a return to plaintiff's show cause order herein.

And good cause appearing therefor, it is further likewise Ordered that the defendants, A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock as County Commissioners of Minnehaha County, South Da-

kota, Fred E. Ward, as Auditor of Minnehaha County, South Dakota, and J. O. Anderson, as Treasurer of Minnehaha County, South Dakota, have and they are hereby granted until August 25th, 1921 at Ten o'clock A. M. to file their answers to plaintiff's bill herein, and to make a return to plaintiff's show cause order herein.

And it is further Ordered that the hearing of said show cause order be and the same is hereby adjourned to August 25th, 1921, at Ten O'clock A. M.

Dated this 11th day of August, A. D. 1921.

By The Court:

(Seal of Court)

JAS. D. ELLIOTT,
Judge of the District Court.

Attest:

Jerry Carleton,
Clerk of the District Court.

Endorsed: Filed in the District Court on Aug. 19,
32 1921, at 2 P. M.

And afterwards, to-wit, on the 1st day of September A. D. 1921, there was filed in the office of the clerk of said court, Answer of Defendants; that the Title of the Case, Paragraphs A, B, C, D and F of defendants' Special Answer, Introduction and Paragraphs first to Nineteenth, inclusive, of defendants' General Answer, Paragraphs I, VI, VIII, XI, XII, XIII and XIV of the defendants' Affirmative Defense, the Prayer, Petition of F. L. Blackman and others to reconstruct and improve drainage ditches No. 1 and 2, the Order for filing said Petition, the Resolution for survey under said Petition, the Resolution fixing the exact line and width of the ditch and fixing the time and place for hearing said petition, and the Resolution establishing Drainage Ditch No. 1 and 2, all as contained in said Answer of Defendants, are in words and figures the following, to-wit:

The Chicago, Rock Island and Pacific Railway Company, a Corporation, Plaintiff,

vs.

A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock, as County Commissioners of Minnehaha County, South Dakota, Fred E. Ward, as Auditor of Minnehaha County, South Dakota, and J. O. Anderson, as Treasurer of Minnehaha County, South Dakota, Defendants,

Minnehaha National Bank of Sioux Falls, South Dakota, Sioux Falls National Bank of Sioux Falls, South Dakota, Security National Bank of Sioux Falls, South Dakota, First National Bank of Dell Rapids, South Dakota, First National Bank of Garretson, South Dakota, Savings Bank of Colton, South Dakota, Brandon Savings Bank of Brandon, South Dakota, Minnehaha, County Bank of Valley Springs, South Dakota, The Rowena State Bank of Rowena, South Dakota, Farmers Bank of Humboldt, South Dakota, Dakota Trust & Savings Bank of Sioux Falls, South Dakota, Commercial and Savings Bank of Sioux Falls, South Dakota, Minnehaha State Bank of Garretson, South Dakota, Sioux Falls Savings Bank of Sioux Falls, South Dakota, H. E. Donahoe, W. G. Porter, Intervening Defendants.

Comes now the above named defendants, A. G. Risty, et al., and for their answer to plaintiff's bill of complaint in the above entitled action, admit, deny and allege as follows:

A.

The above named defendants, A. G. Risty, et al, for their answer to plaintiff's bill of complaint, allege that said bill does not state any matter of equity entitling plaintiff 34 to the relief prayed for, nor are the facts as stated sufficient to entitle plaintiff to any relief against the said defendants in that said plaintiff has a plain, adequate and complete remedy at law.

Wherefore, defendants pray the judgment of this Court that said bill be dismissed with their costs.

B.

The above named defendants, A. G. Risty, et al, for their answer to plaintiff's bill of complaint and the allegations contained in paragraph nineteen thereof, to-wit: "That

there will result a multiplicity of suits and that the owners affected will suffer irreparable injury", are not truly stated or alleged in good faith and are stated with the false and fraudulent purpose of imposing upon the jurisdiction of this court and they are therefore fictitious and fraudulent. And said defendants say there are no other actions at law or in equity pending or threatened against said plaintiff and that said plaintiff has a plain, adequate and complete remedy at law, all of which these defendants allege to be true and plead the same in bar to said bill.

Wherefore, defendants pray the judgment of this Court that said bill be dismissed with their costs.

C.

The above named defendants, A. G. Risty, et al, for answer to plaintiff's bill of complaint, allege that said suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of this Court in that this suit is wholly based upon the alleged existence of a federal question and diversity of citizenship, and that the amount sued for and the value of the subject matter as alleged in said bill is not truly stated or alleged in good faith. That 35 the allegations of plaintiff's bill show it as being "a suit of a civil nature to resist and prevent an assessment upon the property of this plaintiff under the pretended authority of a purported act of the legislature of the State of South Dakota, claimed by plaintiff to be in conflict with the due process of law clause of the Fourteenth Amendment to the Constitution of the United States, and that the amount in controversy herein exceeds, exclusive of interest and costs, the sum or value of Three Thousand Dollars (\$3,000.00) and is the amount of the threatened assessment, to-wit: a sum in excess of Seven Thousand Nine Hundred Seventy-four Dollars (\$7,974.00)", are false and stated with a false and fraudulent purpose of imposing upon the jurisdiction of this Court and are therefore fictitious and fraudulent. And said defendants say that the amount involved, or value of the subject matter in this suit, does not exceed the sum of Three Thousand Dollars (\$3,000.00), exclusive of interest and costs; that said bill of complaint upon its face shows that under the drainage law referred to in paragraph four thereof the amount of the assessment, or the amount in controversy herein, has not been, and cannot be, determined until after the equalization thereof provided for in such statute and until such equalization, the amount to be hereinafter assessed, if

any, by said Board of County Commissioners or by the Courts of the State of South Dakota, to which an appeal is taken, as provided for by said law is purely speculative, is uncertain and undeterminable at this time by said plaintiff, this court, or anyone at all, and is dependent entirely upon the showing made by this plaintiff at such hearings and determinations provided for by said law, as to the amount of benefits received by this plaintiff; and that no sum has been or can be assessed and determined against the plaintiff's property until

such equalization of the proportion of benefits has
36 been had, and at which hearings this plaintiff is permitted to make his showing therein and the amount of benefits, if any, which plaintiff does receive are thereafter equalized and fixed by said Board or Court and the Amount so fixed is then extended and assessed against the property of said plaintiff, and not otherwise, all of which these defendants aver to be true and set up, the same in bar of plaintiff's bill of complaint herein.

Wherefore, defendants pray the judgment of this Court that said bill be dismissed with their costs.

D.

The above named defendants, A. G. Risty, et al, for answer to plaintiff's bill of complaint herein, allege that on or about December 4, 1920, an equity suit was instituted in the Circuit Court within and for Minnehaha County, in the State of South Dakota, the same being a Court of general jurisdiction and having jurisdiction over the subject matter there presented by one Oluf O. Gilseth, whose lands are affected by the construction of drainage ditch No. 1 & 2 and against which lands the proportion of benefits for the construction of said ditches has been proportioned upon the same basis and in like manner as the proportion of benefits upon the lands of this plaintiff as hereinafter set forth, which action was brought by the said Oluf O. Gilseth, for himself and as representing an informal organization of farmers and others who are similarly [stituated], against the defendants herein, the Board of County Commissioners of Minnehaha County, South Dakota, and other persons, which action was instituted with [fully] knowledge, approval, acquiescence and consent of the plaintiff herein, its officers, agents and attorneys, and in which said cause the same facts are alleged and relied on in plaintiff's bill of complaint as herein set forth, and which

37 said bill of complaint prayed that said defendants be forever enjoined and restrained from making or attempting to make any proportion of benefits upon the property of the plaintiffs herein, or the property of other property owners within the drainage area of the drainage ditches No. 1 and No. 2 for the costs and construction of said spillway, dams, retaining gates or other work, and be forever restrained and enjoined from levying any assessment upon the property of the plaintiff or upon the property of other property owners in said drainage area for the payment of the costs of the construction of said spillway, dams, retaining gates or other work, for the reason and upon the grounds that the law under which said drainage ditch was established and constructed was in controvention of the due process of law clause in the Fourteenth Amendment of the Constitution of the United States, to which said bill of complaint said defendant Board of County Commissioners and these intervening defendants set up and relied upon the same facts and defense as are hereinafter set forth; that said action came on for trial before said Circuit Court of Minnehaha County, South Dakota, with the full knowledge, acquiescence, consent and approval of plaintiff and at which trial plaintiff was entitled to be heard and was represented by its attorneys on the 31st day of January 1921, evidence was introduced upon said hearing on behalf of said plaintiff and these defendants and after the taking of evidence therein was closed and thereafter upon the facts there presented, and in the trial of which the plaintiff could have and did participate, said Court made findings and conclusions and judgment thereon dismissing said action upon its merits. That a duly exemplified copy of said bill of complaint, answer, findings, conclusions and Judgment are hereto attached, marked
38 "Exhibit B", and made a part hereof, all of which these defendants allege to be true and plead the same in bar.

Wherefore, defendants pray the judgment of this Court that said bill be dismissed with their costs.

* * * * *

Comes now the above named defendants, A. G. Risty, et al, and for answer to plaintiff's bill allege that this suit does not really and substantially, involve a controversy within the jurisdiction of this court, in that this suit involves the determination of facts and matters controlled and governed by

the drainage statute of South Dakota, mentioned in plaintiff's bill of complaint and which by its provisions creates and provides its own special tribunal with exclusive original jurisdiction to try and determine the questions necessarily involved therein, and which are attempted to be presented for litigation in this action, and that, until such determination by said special tribunal so provided for, this court has no jurisdiction over the subject matter set forth in plaintiff's bill of complaint, and that said special tribunal has not fully determined the matters and things herein presented for determination. All of which these defendants allege to be true and plead the same to the jurisdiction of this Court.

Wherefore, defendants pray that plaintiffs' bill of complaint be dismissed with costs.

40

G.

Comes now the above named defendants, A. G. Risty, et al, and for their further answer to the allegations contained in plaintiff's bill of complaint, admit, deny and allege as follows:

First.

That these defendants admit Paragraph I of said bill.

Second.

That these defendants admit Paragraph II of said bill.

Third.

That these defendants admit Paragraph III of said bill.

Fourth.

These defendants, answering said bill of complaint, admit that the Legislature of the State of South Dakota, at its Tenth Session, enacted a law entitled: "An Act for the Establishment, Construction and Maintenance of Drainage and Levies in Counties, Whenever such Drainage shall be Conducive to the Public Health, Convenience or Welfare, or Whenever it shall be Necessary or Practicable for the Drainage of Agricultural Lands", which law was approved by the Governor of the State of South Dakota on February 21st, 1907, said law being Chapter 134 of the Session Laws of South Dakota of 1907, and that subsequently thereto, the Legislature of the State of South Dakota, in the years 1909, 1911, 1915 and 1917, enacted laws amendatory thereto, and in 1919 re-enacted said law and amendments thereto, as Sections 8458, to 8491, inclusive, of

the South Dakota Revised Code for 1919, and thereafter in the years 1920 and 1921, enacted amendments thereto which law and amendments now constitute the drainage laws of the State of South Dakota, and specifically deny each and every other allegation of said paragraph.

Fifth.

These defendants answering the Fifth Paragraph of
41 complainant's bill, deny that the Board of County Commissioners of Minnehaha County, South Dakota, established a drainage ditch known as "Drainage Ditch No. 1 and No. 2, as therein alleged, but allege the fact to be that in the year 1907 the Board of County Commissioners of Minnehaha County, upon the petition of William H. Lyon, accompanied by a proper bond, approved by the County Auditor, and after due notice and other procedure pursuant to and under Chapter 134 of the Laws of 1907 of the State of South Dakota, established Drainage Ditch No. 1, commencing at a point named in the Southeast Quarter (SE $\frac{1}{4}$) of Section Twenty-nine (29), Township One Hundred Two (102), Range Forty-nine (49), running thence about two (2) miles directly South, thence in a Southeasterly course about a mile, cutting through the rim of the natural ridge or bluff just North and East of the State Penitentiary in the City of Sioux Falls, and descending about one hundred (100) feet following the slope of the hill, and terminating in the Big Sioux River on the Northeast Quarter (NE $\frac{1}{4}$) of Section Nine (9), Township One Hundred One (101), Range Forty-nine (49), which said drainage ditch was constructed so as to have a bottom width of forty (40) feet, except where the same cut through the bluff and descended into the Big Sioux River, where a thinly lined concrete gutter or spillway with sufficient capacity only to carry the water that was planned to come through the said ditch, was constructed, but the terminal thereof was never safely or securely anchored and established, and that thereafter and before the construction of said Drainage Ditch No. 1 had been completed, one Iver R. Peterson and numerous other persons, filed their petition in regular form, accompanied
42 by a proper bond duly approved by the County Auditor, with said Board of County Commissioners, asking and praying that the said Drainage Ditch No. 1 be extended Northward several miles through the Valley of the Big Sioux River, to drain other agricultural lands therein situated; the said petition was found sufficient in form, and was ordered filed and referred to the State Engineer, and a resolution for survey regularly adopted thereon, and thereafter,

upon the Engineer's written report of said survey, by resolution, the exact line and width of said ditch extension was fixed, and after due notice and hearing, said petition was allowed, and resolution adopted by the Board of County Commissioners establishing said drainage ditch, and designating it as "Drainage Ditch No. 2", extending from the North end of Drainage Ditch No. 1 hereinbefore described, Northward about twelve (12) miles to a point near the Northeast Corner of Section Thirty-one (31) in Dell Rapids Township, and said drainage ditch was thereafter, constructed, which ditch so constructed, tapped the Big Sioux River in two places, and the assessment for the costs and expense of the construction thereof was duly spread upon the lands benefited within the territory embraced within the initial point in Dell Rapids Township, and the terminal point in Section Nine (9) of Sioux Falls Township; and further answering said Paragraph V, these defendants admit that prior to the year 1916 assessments were duly spread upon the lands determined to be benefited by the construction thereof, and such assessments collected, but deny each and every other allegation in said paragraph contained.

Sixth.

These defendants answering the sixth paragraph of complainant's bill, admit the allegation contained in said paragraph, but allege the fact to be that in addition to the lands drained lying North of the City of Sioux Falls, the said
43 Drainage Ditches No. 1 and No. 2 also drained, affected and benefited lands lying West and South of said City and also the lands adjacent to said River through and in said City of Sioux Falls were drained affected and benefited thereby.

Seventh.

These defendants answering the Seventh paragraph of the complainant's bill, allege that they are without knowledge as to the facts therein set out, and therefore deny the same.

Eighth.

These defendants answering Paragraph VIII of the complainant's bill, specifically deny that Drainage Ditches No. 1 and No. 2 were ever completed prior to the year 1916, or of sufficient capacity to drain the agricultural lands adjacent thereto, and as to the other allegations in said paragraph, these defendants allege that they are without knowledge of the facts therein stated, and therefore deny the same.

Ninth.

These defendants answering the Ninth paragraph of complainant's bill, admit the statements therein made, but in explanation thereof, allege the further facts to be that after the construction of said spillway, as above described, the capacity of said ditches were increased by the rapidly flowing waters therein, eroding the banks and widening said Ditch No. 1 to nearly twice its original width of forty feet; the natural barrier which originally prevented the waters of the Big Sioux River from flowing into said Ditch No. 1 near its initial point, except in flood times, eroded and wore away and permitted a large part of the water from the Big Sioux River to flow uncontrolled directly into said ditch and through the same 44 to said spillway, which said spillway did not have the **capacity to safely carry all of the flood waters** that came to it through said ditch; that by reason of the foregoing facts said ditches became out of repair, and filled with sand bars and mud, and other obstructions, and that, owing to the tortuous course of the Big Sioux River through the district drained by said Ditches No. 1 and No. 2, the said river and said ditches were inadequate to carry away the flood waters and properly drain the lands within the area of said drainage ditches during flood seasons; that on or about the 15th day of March, 1916, during a spring flood, said spillway and outlet for said drainage ditches, as above described, was washed out and destroyed, so that the waters passing through said ditches and outlet, were wholly uncontrolled; that at the place where said spillway had been constructed, the waters descended to the basin of the Big Sioux River over a steep bluff by a drop of approximately of the height of one hundred feet, and that after the washing out and destruction of said spillway and outlet, the waters from said ditches washed out a deep gorge in the bluff, and tore away and destroyed the adjacent land to the extent of several acres; that said outlet and spillway were located in the immediate vicinity of State lands belonging to the State of South Dakota, and in the immediate vicinity of the State Penitentiary, and also of the City Water Works of the City of Sioux Falls, by means of which water works the said City was supplied with water from the gravel beds immediately adjacent to said drainage ditches, and that by reason of the washing out of said spillway and of the uncontrolled waters of said ditches, the said lands of the State of South Dakota, the State Penitentiary and the water works and water supply of the said City of Sioux Falls,

as well as the properties of private citizens in the vicinity of
said outlet and spillway, were greatly imperiled and
45 endangered; that there was imminent danger of the
waters of the Big Sioux River being entirely diverted
from their natural course into Drainage Ditch No. 1 and
through the said spillway and outlet, and the water power of
the Big Sioux River immediately above the mouth of said
drainage ditches thereby destroyed, to the great and irreparable
damage of many private property owners.

Tenth.

These defendants answering the Tenth paragraph of the complainant's bill, hereby specifically deny the same, and each and every allegation thereof, and in explanation of the facts attempted to be therein set out, allege that upon the occurrence of the destruction of the original spillway as hereinbefore set out in the Ninth paragraph hereof, that thereupon the Board of County Commissioners of said Minnehaha County took immediate steps to control the said waters coming through said drainage ditches, by means of dams across said drainage ditches above said spillway, and by driving piling therein, and were so employed when, on or about the 21st day of March, 1916, one Charles Kaufmann, and other persons owning property within the area of said Drainage Ditch No. 2 brought an action in the Circuit Court of Minnehaha County, South Dakota, to restrain said Board from so proceeding to control the waters of said drainage ditches, and obtained an order against said Board, requiring them to show cause why an injunction should not be granted, which said order came on for hearing before the said Court on the 25th day of March 1916, and the said Court thereupon denied said application for said temporary injunction, whereupon said action was dismissed, the same being Circuit Court File of Minnehaha County No. 15708, which is hereby referred to and made a part hereof.

That on or about April 1, 1916, and because of the conditions above described, the plaintiff in the last mentioned suit and a large number of his neighbors, similarly situated and affected by said drainage ditches, perfected an informal organization and appointed a committee of eight members to look after their interests with reference to repairing said drainage ditches, and to urge before the Board of County Commissioners, such improvements as seemed advisable.

That thereafter and on or about the 8th day of April, 1916, several persons representing said local organization or com-

mittee, including some of the said plaintiffs in said last mentioned suit, filed a petition and bond with the said Board of County Commissioners praying that the outlet and spillway to said drainage ditches as originally established and constructed, be closed up and abandoned, and that a new outlet for said ditches be provided by diverting the waters thereof at a point above said spillway, as originally constructed, in a Westerly direction through Covell's Lake, and thence back into the Big Sioux River above the said City of Sioux Falls, upon which said petition the said Board caused a survey to be made, with the approval of the State Engineer, and a surveyor's report to be filed, and a hearing had upon said petition after notice, as required by law upon which hearing numerous property owners within the territory affected thereby, appeared before said Board and filed objections to the said proposed proceedings, and filed numerous large claims for damages by reason of said proposed change of outlet, and that upon said hearing, on July 8th, 1916, said Board made an order allowing the prayer of said petition, and established said Covell's Lake outlet, and abandoned said outlet and spillway as originally established and constructed that thereupon numerous conferences were

had between the petitioners in said proceeding last
47 above referred to, and the said objectors and property
owners owning land within the area of said Drainage

Ditches No. 1 and No. 2, and that it was agreed at said conferences that the proceedings upon said petition last above referred to should be abandoned, and the same were abandoned accordingly, and that a new petition should be filed and new proceedings instituted for the reestablishment of said Drainage Ditches No. 1 and No. 2 and the reconstruction and improvement thereof, and the re-establishment and the reconstruction of the outlet to said ditches, and for the establishment and construction of a new spillway to properly control and take care of the waters flowing through said drainage ditches, and for the enlargement of said drainage district so as to embrace all of the property benefited thereby, extending from the Northern end of said territory included in said Drainage Ditches No. 1 and No. 2, following the course of the Big Sioux River around the City of Sioux Falls, and extending as far down said river as the mouth of said spillway and outlet to said drainage ditches, where the waters thereof were discharged into the Big Sioux River, below the said City of Sioux Falls, and that thereafter, and in accordance with said agreement, and with the consent and acquiescence of this plaintiff, a new drainage petition and bond, ap-

proved by the County Auditor, were filed with the Board of County Commissioners, by the City of Sioux Falls, F. L. Blackman, and other persons who owned lands within the area of and that was assessed for the cost of construction of said Drainage Ditches No. 1 and No. 2, praying for the establishment and construction of a new drainage ditch in the exact location of said original ditches, and the re-establishment and construction of a substantial spillway and outlet therefor, together with several cut-offs or ditches, straightening

and canalizing the channel of the Big Sioux River ad-

48 jacent thereto, so as to improve and increase its carrying capacity, and praying that the assessment area be increased to cover said new territory benefited, pursuant to said agreement, which said petition being found sufficient in form by said Board of County Commissioners, was, on August 3, 1916, ordered filed and referred to the State Engineer, who, with the said Board of County Commissioners, on August 4, 1916, inspected the route of said drainage, and had several conferences with the said persons interested as aforesaid, including this plaintiff, and authorized and ordered a survey to be made by Engineer L. E. Stevens, under supervision of the State Engineer, which said survey was accordingly made by said L. E. Stevens, who, on September 13, 1916, filed his written report with said petition, and thereupon the said Board of County Commissioners fixed the exact route and width of said drainage, and the time and place of hearing thereon, and caused notice of hearing to be given according to law and upon the return date fixed in said notice, after due hearing, and upon the approval and advice of the State Engineer, and without objection upon the part of the plaintiff herein, or any other person, upon October 3, 1916 found said proposed drainage, as petitioned for, to be conducive to the public health, convenience and welfare, and necessary and practicable for [drainage] agricultural lands, and thereupon, by resolution duly adopted, reestablished said drainage ditch in the exact location of the original ditches, and fixed the damages caused by the construction thereof, and designated it as "Drainage Ditch No. 1 & 2", and no appeal was taken from such order establishing said "Drainage Ditch No. 1 & 2", and said order so establishing said Drainage Ditch No. 1 & 2 is now in full force and effect.

Eleventh.

These defendants answering the Eleventh paragraph of the complainant's bill, admit that the Board of County Com-

49 commissioners of Minnehaha County have expended approximately Two Hundred and Fifty-five Thousand Dollars (\$255,000.00) in, payment for work done and material furnished in the construction of ditches, dams, gateways and the spillway upon said Drainage Ditch No. 1 and 2, for which drainage ditch warrants upon Drainage Ditch No. 1 and 2 Fund have been issued, payable only out of the assessments to be hereafter levied upon the lands and properties benefited by the construction of said ditch, and there is now due thereon, for principal and interest, about Two Hundred and Ninety Thousand Dollars (\$290,000.00) and hereby specifically deny each and every other allegation in said paragraph contained, but further allege that the drainage warrants above referred to were issued, only upon duly verified claims, duly presented, audited and allowed by the County Commissioners, and report of the allowance of the same duly published in said Commissioners' proceedings, as provided by law.

Twelfth.

These defendants answering the Twelfth paragraph of complainant's bill, hereby admit that on or about the 3rd day of August, 1916, a petition was filed in the office of the County Auditor of the County of Minnehaha, duly signed by the City of Sioux Falls, by George W. Burnside, its Mayor, and duly attested by Walter C. Leyse, City Auditor, F. L. Blackman, and others, which petition was for the purpose of reconstructing and improving Drainage Ditches No. 1 and No. 2, in Minnehaha County, South Dakota, and to construct a new spillway and outlet to Drainage Ditches No. 1 and No. 2, and to pay therefor by assessments upon the property, persons and corporations benefited thereby, but these defendants specifically deny each and every other allegation, matter and thing contained in said Twelfth paragraph, but allege the facts to be as stated and set forth in the Tenth paragraph of this Answer, and further allege that all acts negatived in said paragraph Twelve, were duly taken, done 50 and performed, upon due notice, as required by the laws of the State of South Dakota.

Thirteenth:

These defendants answering the Thirteenth paragraph of complainant's bill, hereby specifically deny each and every allegation in said paragraph contained, as therein alleged, and allege the facts in relation thereto to be as follows: That

immediately after the establishment of "Drainage Ditch No. 1 & 2", as hereinbefore described, the said Board of County Commissioners, acting under said newly established Drainage Ditch No. 1 & 2, proceeded to dike, clean out, enlarge and re-construct original Drainage Ditches No. 1 and No. 2, and the additional river cut-offs were constructed, and the outlet and spillway of said drainage ditches re-built in a more substantial and permanent manner, upon plans approved by the State Engineer; that in the course of the construction of said spillway, plans were prepared under the supervision of the State Engineer, and approved by him on May 7, 1917, and bids for the construction thereof asked for by legal notice, and upon the opening of said bids and a consideration thereof, it was, by resolution of the Board, determined that the "spillway for which bids have been received for 'Drainage Ditch No. 1 & 2' can be constructed for less money than the amount of any bid submitted therefor", and it was "[Therefor] ordered that the Board of County Commissioners cause such spillway to be constructed, hire the necessary labor, machinery, tools and appliances, and a superintendent to oversee the construction thereof, and purchase all necessary material for such construction, without letting a contract for the entire construction thereof", and the Board thereupon proceeded to construct said spillway in accordance with said determination, ordered the necessary material for the construction thereof, and employed the Sioux Falls 51 Construction Company to furnish the necessary labor, superintendent and supervision of the construction thereof, and to furnish the necessary machinery, tools, etc, to be used in said construction.

From the determination of the Board that it would build said spillway without letting a contract therefor, and by buying the necessary material therefor, and employing the Sioux Falls Construction Company to furnish the necessary labor, machinery, tools, superintendent and supervision thereof, one William H. Lyon, being the original petitioner in the construction of original Drainage Ditch No. 1, appealed to the Circuit Court of Minnehaha County, South Dakota, which appeal came on for hearing before the Court on the 14th day of July, A. D. 1917, and the court, after full hearing and consideration of the evidence introduced on behalf of the appellant and the Board, dismissed said appeal, holding that it appeared that the "decision appealed from is one that rests in

the sound judgment of the Board of County Commissioners, and is not a proper subject for review by the Court"; that the proceedings upon said appeal are contained in File No. 16405 of the Circuit Court of Minnehaha County, South Dakota, which file and proceedings are hereby referred to and made a part hereof.

That thereupon the said spillway and outlet to said Drainage Ditch No. 1 & 2 was immediately re-constructed in a more substantial manner in accordance with the determination of said Board of County Commissioners, under the supervision of the State Engineer of the State of South Dakota, at a cost of more than One Hundred Thousand Dollars (\$100,000.00); that the soil at the place where said outlet and spillway are constructed is of peculiar formation; that beneath the 52 surface at said point are found deep quicksands, the extent of which was at said time unknown to said Board of County Commissioners; that by reason of the necessity for immediate action in the construction of said spillway, and on account of the difficulties to be encountered in the construction thereof, it was impossible to prepare fully completed working plans at the time said work was commenced, but that the working plans had to be modified and adapted to the difficulties encountered as the work progressed, and that thereupon and by reason thereof, and with the approval and under the supervision of the State Engineer, the said Board of County Commissioners employed one F. C. Shenehon, a competent civil and [hydralie] engineer, to prepare working plans and to superintend the construction of said spillway as the work progressed, and that said working plans were so prepared by said Shenehon, and said spillway re-constructed under his immediate supervision and the supervision and approval of the State Engineer, in a substantial and adequate manner, and that the same, as so constructed, has ever since said time been in operation, and for the past three years has safely controlled and cared for the waters flowing through said drainage ditches, and protected the properties adjacent thereto, as aforesaid, from injury and damage by reason of the said waters, and the same is now in successful operation.

These defendants further allege that the records and proceedings in the establishment and construction of Drainage Ditch No. 1 & 2, on the petition of F. L. Blackman, the city of Sioux Falls, and other persons, referred to in Paragraph Fifth hereof, except the lengthy notices, are hereunto annexed, marked Exhibit "A", and made a part hereof, and

that all of said proceedings were taken and had after due and legal notice, as required by law, which notice specifically named the plaintiffs herein, and cited it to show cause why said drainage ditch should not be constructed as petitioned for.

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Fourteenth.

These defendants answering the Fourteenth paragraph of complainant's bill, hereby specifically admit the facts therein set out, except the allegations that said "Chenoweth & Rettinghouse were to be paid in Drainage ditch warrants drawn on Drainage Ditch No. 1 and No. 2", and except the further allegation that they "made a purported proposed distribution of benefits; that a copy of said proposed distribution is hereto annexed, marked Exhibit 'B', and made a part hereof", which allegations are hereby specifically denied, and the facts are alleged to be that the said Chenoweth Rettinghouse were paid in drainage warrants drawn on Drainage Ditch No. 1 & 2 Fund, and that said Exhibit "B" referred to, is merely an analysis or resume or deduction drawn from the facts set out in the report, merely for the purpose of showing the results shown by the proportion of benefits recommended.

Fifteenth.

These defendants answering the Fifteenth paragraph of complainant's bill, deny that said Board of County Commissioners, on the 10th day of June, 1921, adopted a purported notice of time and place of equalizing the proportioning of benefits for the construction of said spillway, etc., as therein alleged, but allege the fact to be that for the purpose of making a proper and accurate assessment of the proportion of benefits among the lands affected within the said area drained by said Drainage Ditch No. 1 & 2, the defendants, the County Commissioners, have caused to be made a topographical survey of said drainage district, upon which to base an assessment, for the purpose of producing the necessary funds with which to pay the certificates of indebtedness, or drainage warrants, heretofore issued in the sum of about

54 Two Hundred and Fifty-five Thousand Dollars (\$255,000.00), in payment of the labor, material, etc, used in said drainage work, as hereinbefore described, and have carefully gone over and inspected the whole area of said drainage district, and the lands affected thereby, and after such inspection and a full and careful consideration thereof, the said defendants, the Board of County Commis-

sioners, did, on the 10th day of June, 1921, by resolution duly adopted and filed in said proceedings, fix the proportion of benefits among the lands affected, including the City of Sioux Falls, the various railroads and townships, according to the best judgment of said Board, taking into consideration the direct and indirect benefits that accrue by the construction of said drainage, taking a particular tract as a, unit for comparison, after determining the extent of the benefit to said unit, and considering and fixing the proportion to all lands and properties affected upon the same basis, but that the benefits so fixed and determined do not more than equal fifty per cent., of the benefits actually received by each of the lands and properties affected, in the judgment of said Board, and said determination is now in full force and effect; that in said resolution the time and place of equalizing assessment was fixed, and notice of said equalization of benefits has been given, according to law, to this plaintiff, at which time and place, the apportionment fixed as to the plaintiff's property and other property, will be equalized, and the assessment will be later extended and spread on said equalization, but the defendants have no knowledge of the total number of Units or sum in dollars that will finally be equalized and assessed against said plaintiff's property. The defendants further allege that the notice, in addition to being published, as stated, was also posted according to law, and deny the balance of said paragraph.

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Sixteenth.

These defendants answering the Sixteenth paragraph of complainant's bill, specifically deny the same.

Seventeenth.

These defendants answering the Seventeenth paragraph of complainant's bill, specifically deny the same, and each and every allegation thereof.

Eighteenth.

These defendants answering the Eighteenth paragraph of complainant's bill, specifically deny the same, and each and every allegation thereof.

Nineteenth.

These defendants answering the Nineteenth paragraph of complainant's bill, specifically deny the same and each and every allegation thereof.

* * * * *

I.

That said proceedings of the said Board of County Commissioners so taken and had in the establishment and construction of said Drainage Ditches No. 1 and No. 2, and in the assessment and equalization of the proportion of benefits, and in the assessment of the cost thereof upon the lands benefitted thereby, were taken and had after due and legal notice as required by law, and that said ditches were so established and constructed in accordance with said proceedings.

VI.

These defendants further allege that the records and proceedings in the establishment and construction of Drainage Ditch No. 1 & 2, on the petition of F. L. Blackman, the City of Sioux Falls, and other persons, referred to in Paragraph III hereof, except the lengthy notices, are hereunto annexed, marked Exhibit "A", and made a part hereof, and that all of said proceedings were taken and had after due and legal notice, as required by law, which notice specifically named the plaintiff herein, and cited it to show cause why said drainage ditch should not be established and constructed as petitioned for.

VIII.

And the defendants, further answering complainant's bill, admit that they entered into a contract with Chenoweth & Rettinghouse, civil engineers, to make and perfect a topographical survey of all the lands lying between the City of Dell Rapids and the outlet to said spillway and drainage ditch, lying within the alley of the Big Sioux River, and that said survey was necessary and was made in order that said defendant Board might advisedly make an apportionment of and fix the benefits to the lands and properties affected by reason of the benefits derived by said plaintiff and others like situated, by reason of the diking, cleaning out, reconstruction and improvement made upon said drainage ditch, the river cut-offs and new spillway and outlet to said ditches; and further allege that the original petition for said drainage ditch, river cut-offs and spillway, hereinbefore mentioned, was a compromise between the said petitioners therefor and others affected thereby, as hereinbefore set forth, and that the making and filing of said petition, accompanied by a bond, as provided by law, which was duly approved by the County Auditor of Minnehaha County, South Dakota, trans-

mission of a copy thereof to the State Engineer, the inspection of the proposed route of said drainage project, the causing and ordering of a survey thereof to be made by a competent surveyor under the supervision of said State Engineer, the surveyor's report thereon, the filing of the same by the Board with said petition, said Board's determination of the exact length and line and width of said drainage improvement, and the order and resolution of said Board fixing

59 a time and place for hearing said petition, and the giving of notice thereof, the establishment of said drainage district and project by resolution and order of said

Board upon said hearing, and the subsequent notice given to all parties interested, of the establishment of the cut-off ditches, including the plaintiff herein, and the final establishment thereof, and all work done and performed upon said ditches and river cut-offs ditches, and the establishment and construction of said spillway and work done thereon, and the manner of doing the same, and all other work done and performed upon said drainage ditch, cut-offs and spillway, were done and performed by said defendant Board, with the notice, actual knowledge, acquiescence, approval and consent of the plaintiff herein, its officers, agents and servants, and all others like situated, and said plaintiff and all others like situated during all the time said ditch, river cut-offs and spillway were being established, layed out and constructed, had notice and actual knowledge that payment therefor was to be made by special assessments against the lands and properties of said plaintiff affected thereby, and the lands of others like situated, and that there was no other provision of law or method of making such payment, and said plaintiff and none other of said parties took any legal steps to stop or prevent the establishment of, or work performed upon said ditches, river cut-offs or spillway, or the issuance of certificates of indebtedness or drainage warrants therefor, which said parties had notice and actual knowledge, of, were to be taken up and paid only by said special assessments as aforesaid; and that said plaintiff and others like situated are now,

60 and since 1918 have been receiving large and continuing benefits to their lands and properties affected, by reason of said reconstruction and construction of said drainage ditch, river cut-offs and spillway, under the said re-establishment as Drainage Ditch No. 1 & 2.

That by reason of each and all of the foregoing facts, acts and resolutions and orders done, passed and performed

as hereinbefore set forth, the said plaintiff and all others like situated are now estopped and forever barred from in any manner claiming or asserting any right or relief herein, or at all.

XII.

That in pursuance of said resolutions and orders hereinbefore referred to and set forth, and for the purpose of making a proper and accurate assessment of the proportion of benefits among the lands affected within the said area drained by said Drainage Ditch No. 1 & 2, the defendants, the County Commissioners, have caused to be made a topographical survey of said drainage district, upon which to base an assessment, for the purpose of producing the necessary funds with which to pay the certificates of indebtedness, or drainage warrants, heretofore issued in the sum of about Two Hundred and Fifty-five Thousand Dollars (\$255,000.00), in payment of the labor, material, etc, used in said drainage work, as hereinbefore described, and have carefully gone over and inspected the whole area of said drainage district, and the lands affected thereby, and after such inspection and a full and careful consideration thereof, the said defendants, the Board of County Commissioners, did, on the 10th day of June, 1921 by resolution duly adopted and filed in said proceedings, fix the proportion of benefits among the lands affected, including the City of Sioux Falls, the various railroads and townships, according to the best judgment of said

Board, taking into consideration the direct and indirect benefits that accrue by the construction of said

drainage, taking a particular tract as a unit for comparison, after determining the extent of the benefit to said unit, and considering and fixing the proportion to all lands and properties affected upon the same basis, but that the benefits so fixed and determined do not more than equal fifty per cent., of the benefits actually received by each of the lands and properties affected, in the judgment of said Board, and said determination is now in full force and effect; that in said resolution the time and place of equalizing assessment was fixed, and notice of said equalization of benefits has been given, according to law.

XIII.

The above named defendants, A. G. Risty, et al, further answering plaintiff's bill of complaint allege that heretofore and on and prior to October 3, 1916, due and legal notice was given to the plaintiff herein of the time and place appointed by the

Board of County Commissioners of Minnehaha County, South Dakota, for claiming any damage by reason of the establishment, construction and reconstruction of drainage ditch No. 1 and 2 and that the plaintiff herein wholly failed and neglected to present the said Board of County Commissioners at said time and place, to-wit: October 3, 1916, any claim for damages therein, and that by reason thereof this plaintiff is now estopped and debarred from claiming or asserting herein any right, or claim to any damage by reason of the establishment, construction and reconstruction of drainage ditch No. 1 and 2.

XIV.

The above named defendants, A. G. Risty, et al, for further answer to plaintiff's bill of complaint, allege that the plaintiff is not entitled to the aid of a court of equity herein, for 63 the reason that said plaintiff has failed, neglected and refused to tender or offer to tender herein the amount of the actual benefits received by it by reason of the establishment, construction and reconstruction of Drainage Ditch No. 1 and 2.

Wherefore, the defendants, above named, pray that the plaintiff's bill of complaint in said action be dismissed, with costs.

E. O. JONES,
L. E. WAGNER,
Solicitors for Defendants.

B. C. Matthews,
Of Counsel.

* * * * *

Exhibit "A"

Petition.

To Reconstruct and Improve Drainage Ditches Numbers One and Two in Minnehaha County, South Dakota, and to Construct a New Spillway or Outlet to Said Drainage Ditches Numbers One and Two and to Pay Therefor by an Assessment upon the Property, Persons and Corporations Benefitted Thereby.

To The Honorable Board of County Commissioners of Minnehaha County, South Dakota:

1. The undersigned petitioners respectively represent and show that they are all residents of Minnehaha County, South

Dakota and that each of them is the owner of certain lands and real property situate and lying in said county in the valley of the Big Sioux River and within the territory to be drained, protected and benefitted by the reconstruction and improvement of drainage ditches One and Two in said Minnehaha County, South Dakota, and by the construction of a new spillway or outlet to said drainage ditches numbers One and Two.

2. Your petitioners further represent and show that said drainage ditches Numbers One and Two were established for the purpose of draining agricultural lands in 1907 and 1910 respectively as appears from records of said proceedings in the office of the County Auditor of Minnehaha County, South Dakota, which are hereby referred to and made a part hereof.

3. Your petitioners further represent and show that the said Drainage Ditches Numbers One and Two and the outlet thereto as constructed were and are insufficient to accomplish the purpose for which they were constructed and were
65 and are insufficient to properly drain the agricultural lands within the districts or territory supposed to be drained thereby and insufficient for the drainage of other agricultural lands lying within the valley of the Big Sioux River above the mouth of the outlet to said Drainage Ditches Numbers One and Two and between the mouth of said outlet and the lands heretofore included within the assessment districts upon which the cost of the construction of said drainage ditches One and Two was imposed and insufficient as constructed to improve, promote and conserve the public health and welfare within said territory hereinbefore described above the mouth of the outlet to said ditches Numbers One and Two lying partly within the City of Sioux Falls, South Dakota, all of which said lands and property would be benefitted, drained and protected by a proper reconstruction and improvement of said Ditches One and Two and by the construction of a new and proper spillway or outlet to the same by means whereof the public health and welfare within the area hereinbefore described and referred to above the mouth of the outlet to said ditches would be conserved and improved.

4. Your petitioners further represent that it is necessary for the drainage of agricultural lands within said drainage districts Numbers One and Two and also agricultural lands lying above the mouth of the spillway or outlet to said ditches and between the mouth thereof and the present boundaries of said drainage Ditches Numbers One and Two to reconstruct, deepen, widen and improve said drainage ditches

One and Two and to construct a new outlet or spillway thereto and that the construction of such new outlet or spillway and the reconstruction and improvement of said Ditches One and Two would also be conducive to the public health, convenience and welfare of the
66 City of Sioux Falls, South Dakota, and also of the

County of Minnehaha, South Dakota and people resident within the said area hereinbefore described lying between the present boundaries of said drainage districts One and Two and the mouth of the outlet to said ditches and within the valley of the Big Sioux River, partly within the corporate limits of the City of Sioux Falls, and that in the reconstruction of the said ditches One and Two, it will be necessary that the same be cleaned, deepened, widened and that certain levees, dikes, flood gates and barriers thereto be constructed to such extent as may be necessary to carry out the surplus or flood waters and to properly drain and protect the lands within said drainage districts and within the area hereinbefore described and within the city of Sioux Falls and to properly conserve and promote the public health and welfare within the said area as aforesaid.

5. Your petitioners further represent that there should be constructed and installed in the said Drainage Ditches Numbers One and Two and at the head of the said Spillway or outlet of said Drainage Ditches, controlling gates for the purpose of regulating and controlling the amount of water flowing through the said ditches and over the said Spillway, the number and location of said gates and the manner in which they should be installed should be determined by the County Commissioners upon the advice of their engineers.

6. Your petitioners further represent that the present spillway or outlet to said Drainage Ditches Numbers One and Two where the same empties into the Big Sioux River in Section Nine (9) Township One Hundred and one (101) of Range forty-nine (49) is wholly insufficient and has been practically destroyed by the action of the water thereon, so
67 that the same has become inefficient as a means of disposing of the waters flowing in said drainage Ditches Numbers One and Two and to such an extent that it has become dangerous to abutting property and to persons living within the vicinity thereof and that it is necessary to entirely abandon said present spillway or outlet and to construct an entirely new outlet or spillway in place thereof in accordance with a new and different plan therefor, the new spillway to be located at or near the present location of the present spillway.

7. Your petitioners further represent that the said drainage ditch or drainage system should consist of the following ditches: First a ditch having its initial point at the beginning of Section Two, (2) of Drainage Ditch Number Two (2) of Minnehaha County as now established at the creek near the Northeast corner of Section thirty-one (31) Township One hundred four (104) of Range Forty-nine (49) and should then run Southwesterly to near the center of said Section thirty-one (31) and then south near the center line through said Section Thirty-one (31) and through Sections Six (6) and Seven (7) of Township one hundred three (103) of Range forty-nine (49) into Section eighteen (18) and then in a Southeastery direction having its terminal point upon the Big Sioux River Sixteen hundred forty feet (1640) east of the said center of Section Eighteen (18), Township One hundred three (103) of Range forty-nine (49) following the present location of the said Section Two (2) of Drainage Ditch Number Two of Minnehaha County as now located.

Also a ditch having its initial point at the present beginning of Section One of Drainage Ditch Number Two of Minnehaha County, at the high water channel of the Big Sioux River in the Southeast quarter of Section Twenty (20) Township One hundred three (103) of Range forty-nine (49) thence running in a general southerly direction through the Southeast quarter of Section Twenty (20) Township one hundred three (103) of Range forty-nine (49) and the Northeast quarter of Section twenty-nine (29), The Southwest quarter of Section twenty-eight (28) the west half of Section thirty-three (33) all in Township one hundred three (103) of Range forty-nine (49) and the west half of Section four (4) the northwest quarter of section nine (9) the Southeast quarter of Section eight (8) the east half of Section seventeen (17), the east half of section twenty (20) and the east half of Section twenty-nine (29) all in Township one hundred and two (102) of Range Forty-nine (49) with its terminal point at the southern end of said Section One of Drainage Ditch Number Two in the Southeast quarter of Section twenty-nine (29), Township One hundred two (102) of Range forty-nine (49) following the line of the said Section One of Drainage Ditch Number Two as now established in Minnehaha County.

Also a ditch having its initial point at the present beginning of Drainage Ditch Number One of Minnehaha County at or near the Northeast quarter of the Southeast quarter of the Southeast quarter of Section twenty-nine (29) Township one

hundred and two (102) of Range forty-nine (49) thence running south across the East half of the East half of Section Thirty-two (32) in Township one hundred two (102) of range forty-nine (49) and the East half of the Northeast quarter of Section Five (5) Township one hundred one (101) of Range forty-nine (49) and the Northeast quarter of the Southeast quarter of Section five (5) Township one hundred one (101) of Range forty-nine (49) thence across the West half of the Southwest quarter of Section four (4) in Township one hundred one (101) Range forty-nine (49), thence across

69 the northwest quarter of Section Nine (9) Township

One hundred one (101) of Range forty-nine (49) and the Southwest quarter of the Northeast quarter of Section nine (9) township one hundred one (101) of Range forty-nine (49) where it empties into the Big Sioux River having its initial point and terminal point the same as and following the line of Drainage Ditch Number One as now established in Minnehaha County. With also, a branch drain or second part beginning at the point near the center of the Northeast quarter of the Northeast quarter of Section thirty-two (32) in Township one hundred two (102) of Range forty-nine (49) running thence in a southeasterly direction across the Southeast quarter of the Northeast quarter of Section thirty-two (32) in Township one hundred two, (102) of Range forty-nine (49) to where it connects with the main ditch of Drainage Ditch Number One as now established in Minnehaha County.

8. Your petitioners further represent that in order to make the foregoing drainage system complete and adequate for the purposes for which it is designed, that it will be necessary to straighten, clear out and deepen the channel of the Big Sioux River at a number of places within the said Drainage District and especially to straighten the channel, of the said River upon Section thirty-two (32) Township one hundred three (103) of Range forty-nine (49) by a ditch cutting off the bend in said river on said Section. Also to straighten the said River upon section Eight (8) Seventeen (17), Twenty (20) and Twenty-nine (29) in Township one hundred two (102) of Range forty-nine (49) by cutting off bends of the said Sioux River situated upon those Sections, the exact location of the said ditches for straightening, clearing out and deepening
70 the channel of the said Sioux River to be determined by the County Commissioners upon advice of their engineers.

9. Your petitioners further represent and show that the lands and territory likely to be affected by the construction of such new spillway or outlet and by the reconstruction and improvement of said drainage ditches One and Two and which will be drained, benefitted and protected thereby and within which territory the public health and welfare will be promoted includes all of the lands lying in the valley of the Big Sioux River and included within the present boundaries of said Drainage Districts Numbers One and Two as well as all of the lands in said valley, of the Big Sioux River between the mouth of said spillway or outlet to said ditches and the City of Dell Rapids, South Dakota, that subject to overflow by the waters of the Big Sioux River and that will be subject to overflow and damage by the waters of said River if the said outlet to said Drainage Ditches Numbers One and Two be abandoned and said outlet thereto closed and that the said District should be so extended and enlarged as to include all lands and property benefitted thereby as far down the valley of the Big Sioux River as the mouth of said outlet or spillway and including therein the corporation of the City of Sioux Falls as well as the corporation of the County of Minnehaha, South Dakota, which said corporations your petitioners further represent are and will be largely benefitted by the reconstruction and improvement of said ditches and construction of said new outlet or spillway thereto to their highways, bridges and other corporate properties owned by them respectively.

Dated this 15th day of July, A. D. 1916 .

Attest:

WALTER G. LEYSE,
City Auditor.

(Seal of the City
of Sioux Falls)

CITY OF SIOUX FALLS

By Geo. W. Burnside,
Mayor.

F. L. BLACKMAN,

W. BRALEY,

DEN DONAHOE

DAN A. DONAHOE,

W. M. DONAHOE

CATHERINE PECK

PORTER P. PECK

MARY C. BRACE

RISTY, ET AL., ETC., VS.

JOHN P. BLEEG

FRANCES G. CARPENTER

M. RUSSELL, By Louis Caille,
Agt.

McKINNEY & ALLEN

E. D. CLARK

C. C. BRATRUD

L. P. CALDWELL

Filed in the office of the Auditor of Minnehaha County,
South Dakota this 3 day of Aug. 1916

HARRY H. HOWE,
County Auditor.

72 Order for Filing Petition for Drainage

State of South Dakota,
County of Minnehaha—ss.

In re Drainage Ditch Numbers 1 and 2 Minnehaha County,
South Dakota.

Whereas F. L. Blackman and others of the County of Minnehaha, State of South Dakota, have this day presented to this Board a petition for the construction of a drainage ditch conducive to public health, convenience and welfare and for the purpose of draining agricultural lands in the Big Sioux River Valley which lands have heretofore been drained and protected from overflow by ditches Number 1 and 2 of Minnehaha County as heretofore established and constructed, in which petition it is represented that it is necessary to re-construct, improve and extend said drainage ditches Number 1 and 2 and to construct a new spillway or outlet where said drainage ditch number one empties into the Big Sioux River in Section Nine (9), Township One Hundred and One (101), Range Forty-nine (49) by reason of the fact that the spillway or outlet of said drainage ditch number 1 is inadequate for its purpose and has been destroyed by action of the water; also that the drainage ditches number 1 and 2 are not adequate for the purpose of which they are constructed and that they should be cleaned, deepened and widened and levees, dikes, and barriers remodeled, re-constructed and improved in such places and to such extent as may be necessary to carry

off the surplus or flood water and properly drain the land to be drained thereby and protect other land subject to overflow; also that there should be constructed and installed in said drainage ditches 1 and 2 necessary flood gates for the

purpose of regulating the amount of water flowing
 73 through; also that it is necessary in order to make such drainage system complete and adequate for the purpose for which it is designated to straighten, clear out and deepen the channel of the Big Sioux River at different places within the drainage district of said drainage ditches number 1 and 2, and said petition having been by this board examined and found sufficient in form and being accompanied by bond with sureties approved by the County Auditor.

Now Therefore it is hereby ordered by the Board of County Commissioners of Minnehaha County, South Dakota, that the said petition be forthwith filed with the County Auditor of this County and that a copy thereof be transmitted by the said County Auditor to the State Engineer.

A. G. RISTY,
 Chairman of County Board.

Filed in the office of the Auditor of Minnehaha County,
 S. D., this 3 day of Aug. 1916.

HARRY H. HOWE
 County Auditor.

74 Resolution for Survey.

Whereas on the 3rd day of August, A. D. 1916, the City of Sioux Falls, F. L. Blackman and others of Sioux Falls, Minnehaha County, South Dakota, presented to this board a petition for the drainage of lands in the Big Sioux River Valley for the establishment of a drain chiefly to carry off the overflow water of the Big Sioux River, such drain to begin at the beginning of Section two (2) of drainage ditch number 2 of Minnehaha County, as now established at the creek near the northeast corner of Section 31, Township 104, Range 49, and should end at a point on the said river near the center of Section 9, in Township 101, Range 49, where drainage ditch number 1 as now established in Minnehaha County, empties into the Big Sioux River, which position was accompanied by a proper bond with sureties approved by the County Auditor of said County; and

Whereas said petition was by this board examined and found sufficient in form and was ordered filed with the County Auditor of said County, and was so filed on the 3rd day of August A. D. 1916; and

Whereas this board together with the State Engineer did on the 14th day of August, A. D. 1916, inspect the proposed route of such drainage; and

Whereas this board deems it necessary that a survey of the proposed drainage be made by a competent surveyor.

Now Therefore it is Ordered that a survey be made of the lands in the Big Sioux River Valley between the City of Dell Rapids and the terminus of said proposed drainage for the purpose of determining the exact line of said drainage and the most practicable method of draining the entire section of the country of which the lands proposed to be drained are a part. Such surveyor shall include in his report to this board a description of the exact line of said drainage ditch or ditches as suggested in said petition, the size and [width] thereof [of] such survey to be made under the supervision of the State Engineer and report filed with the County Auditor with all convenient speed.

And the chairman of this board is hereby authorized to employ such surveyors and his assistants and purchase such material as may be necessary for such survey.

Approved this 14th day of Aug. 1916.

A. G. RISTY.

* * * * *

76 Resolution Fixing the Exact Line and Width of Ditches and Fixing the Time and Place for Hearing Petition.

(Commissioners Proceedings, September 13, 1916)

Whereas, on September 13, 1916, Mr. L. E. Stevens, Civil Engineer employed by this Board for the making of a survey for a proposed drainage ditch, in the valley of the Big Sioux River, in Minnehaha County, South Dakota, in the territory previously partially drained by Drainage Ditches Numbered One and Two, as heretofore established, pursuant to the petition of the City of Sioux Falls, F. L. Blackman and others, filed August 3, 1916, did file his report of such survey, together with maps and profiles; and

Whereas, this Board has personally inspected the route of said proposed drainage, as described in said petition and as described in the engineer's said report;

Wherefore, be it resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the route and width of said proposed drainage, be and the same is hereby fixed as described in said Engineer's report, and that the [requisit] right-of-way for said drainage ditch and dump space be as described in said engineer's report; and

Be it further resolved that Monday, the 2 day of October, 1916, at 2 o'clock, P. M. at the Office of the County Auditor of said County be and it is hereby fixed as the time and place for hearing of said petition and that notice thereof be given in accordance with the provisions of Section Four (4) of Chapter 134, of Laws of 1907, as amended by Chapter 102 of the Laws of 1909 of the State of South Dakota, the same to be signed by the Chairman of this Board and Attested by the County Auditor, by publication once in each week
77 for two consecutive weeks in the Sioux Falls Daily Press, and by posting copies of said notice in at least three of the most public places near the route of said proposed drainage ditch, such posting to be made at least ten days prior to the time of said hearing.

Approved:

A. G. RISTY,
Chm. Co. Bd.

78 Resolution Establishing Drainage Ditch No. 1 and 2.

In the matter of the petition of the City of Sioux Falls, F. L. Blackman, W. Braley and others, for the establishment of a drainage ditch, filed in the office of the County Auditor of Minnehaha County, South Dakota, on August, 3, 1916, coming on to be heard by the Board of County Commissioners of said county at a regularly adjourned meeting, on Monday, the 2 day of October, A. D. 1916, pursuant to notice heretofore given, the said Board having heard and considered said petition and all matters in support of the same, and in opposition thereto, and being fully advised by the state engineer with reference thereto, now therefore

Be It Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the said principal

drainage ditch as hereinafter described and set forth, is conducive to the public health, convenience and welfare and it is necessary and practicable for the drainage of agricultural land and it is so found;

Be It Further Resolved that the said drainage ditch as hereinafter described be, and it is hereby named and designated as "Drainage Ditch No. 1 and 2";

Be It Further Resolved that the said Drainage Ditch No. 1 and 2 be and the same is hereby established in accordance with the resolution adopted by this Board on September 13, 1916, in so far as the same is set out and described in Sections One, Two, and Three of the engineer's report of preliminary survey, filed herein on September 13, 1916, and particularly described as follows:

79

Section One.

Commencing at a point Fifty-eight (58) feet west and Ten Hundred and Thirty-five (1035) feet north of the Southeast corner of Section Twenty-nine (29), Township One Hundred and Two (102), Range Forty-nine (49) west of the 5 P. M. running thence South parallel to the adjacent highway Two Thousand and Eighty-five (2085) feet to Station One Hundred and Fourteen (114); also commencing at a point Six Hundred and Seventy-four (674) feet north and about Thirty-five (35) degrees west of said Station number One Hundred and Fourteen (114) thence southeasterly Six Hundred and Seventy-four (674) feet to said Station number One Hundred and Fourteen (114), thence south and parallel to said highway Seventy-seven Hundred (7700) feet to station number Thirty-seven (37) thence south forty-five (45 degrees east Three Thousand Seven Hundred (3700) feet to station number zero (0) the same being on high water line, thence South Fifty-nine (59) degrees and Thirty-six (36) minutes east, Four Hundred and Fifty (450) feet, thence south Thirty-one (31) degrees east to the Big Sioux River, the said line being the center line of said drainage ditch, and is intended to cover the exact location of drainage ditch number 1 as now established and constructed.

Section Two.

Commencing at a point Ten Hundred and Thirty-five (1035) feet north and Fifty-eight (58) feet west of the Southeast corner of Section Twenty-nine (29) in Township One Hundred and Two (102) of Range Forty-nine (49), the same being the commencement point of Section 1, hereinbefore de-

scribed, running thence north Five Hundred and Forty-seven (547) feet; thence north Twenty-three (23) degrees west Thirty-three Hundred and Eighteen (3318) feet to a point

80 Fifty-eight (58) feet west of the quarter quarter line in the northeast quarter of Section Twenty-nine (29) in said Township; thence north parallel with and fifty-eight (58) feet west of said quarter quarter line through Sections Twenty-nine (29), Twenty (20), Seventeen (17) and a part of Section Eight (8), Twelve Thousand Nine Hundred and Thirty-five (12,935) feet; thence north Fifty (50) degrees east Twenty-seven Hundred and Thirty-two (2732) feet to a point thirty-three (33) feet west of the west line of the right of way of the Chicago, Milwaukee & St. Paul Railway Company, in the Northwest quarter of Section Nine (9) in said Township; thence Northerly parallel with and Thirty-three (33) feet west, of said right of way line Nineteen Thousand Three Hundred and Sixty-eight (19,368) feet to a connection with a high water channel of the Big Sioux River in the Southeast Quarter of, Section Twenty (20) in Township One Hundred and Three (103) North of Range Forty-nine (49).

Section Three.

Commencing at a point Sixteen Hundred and Forty (1640) feet east of the center of Section Eighteen (18) in Township One Hundred and Three (103), Range Forty-nine (49); running thence north Thirty-three (33) degrees west Thirty-one Hundred and Fifty-five (3155) feet to a point sixty (60) feet west of the quarter corner between Sections Seven (7) and Eight (8) in said Township; thence north parallel with and sixty (60) feet west of the quarter line in Sections Seven (7) and Six (6) in said Township and in Section Thirty-one (31) in Township One Hundred and Four (104) North of Range Forty-nine (49) to the center line running east and west through said Section Thirty-one (31); thence north-easterly to the creek near the Northeast corner of said Section Thirty-one (31), the said line being the center line of said proposed drainage.

That in addition thereto the Big Sioux River is to be straightened in Sections Seventeen (17), Eighteen (18) and Twenty (20) in Township One Hundred and Three (103), North of Range Forty-nine (49) in order to afford better means of communication between the lower end of [of] Section Three (3) of said ditch and the upper end of Section Two hereof; the same being intended to cover the exact location of drainage ditch Number Two (2) as now established and constructed.

Be It Further Resolved that the consideration and determination of the question of the straightening of the Big Sioux River at the several points recommended in said engineer's report, be deferred, without passing upon the merits thereof, to some later date, when said straightening of the Big Sioux River may be given more complete consideration, covering the points recommended and other points requested and suggested at the hearing.

Be It Further Resolved that in the construction of the said Drainage Ditch, the rights of flowage of the owner of the mill at or near Baltic, South Dakota, will not in any way be diminished or interfered with and the engineer is hereby directed to so establish the level of the bottom of said drainage ditch where the same joins with creek near the Northeast Corner of Section Thirty-one (31) in Dell Rapids Township, that it will not diminish or interfere with said rights of flowage and that the headgate or other protection now established, be maintained to prevent the waters of the Big Sioux River from flowing into said ditch at a point lower than the maximum height of such rights of flowage;

82 Be It Further Resolved that headgates or controlling gates be established in said drainage ditch, on Section Twenty (20) of Sverdrup Township and on Section Twenty-nine (29) or Thirty-two (32) in Mapleton Township at such place and of such size and material as the state engineer may direct;

Be It Further Resolved that a good substantial adequate spillway be constructed, under the supervision of the state engineer, in said ditch on Section Nine (9) of Sioux Falls Township and that an efficient, substantial controlling gate be constructed at the upper end of said spillway in such manner that the same can be closed and all water be prevented from entering said spillway;

Be It Further Resolved that this Board proceed to assess the damages sustained by each tract of land or other property through which the same shall pass and damages as compensation for the land taken for the route of such drainage and that the same may be made a special order for Friday, October 6, A. D. 1916, at ten o'clock A. M.

A. G. RISTY,
Chairman of Board of County Commissioners
of Minnehaha County, South Dakota.

Filed in the office of the Auditor of Minnehaha County, S.D., this 3 day of October 1916.

HARRY H. HOWE
County Auditor.

Endorsed: Filed in the District Court on Sept. 1, 1921, at
9:30 A. M.

83 And afterwards, to-wit, on the 28th day of November,
A. D. 1921, there was filed in the office of the clerk of
said court, stipulation as to certain Drainage Ditch Notice
and that same be considered as a part of the answer and re-
turns of the defendants and intervening defendant; that at-
tached to said Stipulation is a "Drainage Ditch Notice"
which said Drainage Ditch Notice is in words and figures the
following, to-wit:

84 Drainage Ditch Notice.

Notice is hereby given that Monday, October 2, 1916, at 2 o'clock P. M., at the office of the County Auditor of Minnehaha County, South Dakota, has been fixed by the Board of County Commissioners of Minnehaha County, as the time and place for the hearing of the petition of the City of Sioux Falls, F. L. Blackman, W. Braley and others filed August 3rd, 1916, for the establishment and construction of a drainage ditch, pursuant to the provisions of chapter 134 of the laws of 1907 of the State of South Dakota, as amended by chapter 102 of the laws of 1909, the exact line and width of said drainage ditch has determined by action of said board on September 13, 1916, to be as follows:

Section One.

Commencing at a point fifty-eight (58) feet west and ten hundred and thirty-five (1035) feet north of the southeast corner of section twenty-nine (29) township one hundred and two (102) range forty-nine (49) west of the 5th P. M. runnnig thence south parallel to the adjacent highway two thousand eighty-five (2085) feet to station one hundred fourteen (114); also commencing at a point six hundred and seventy-four (674) feet north and about thirty-five (35) degrees west of said station number one hundred fourteen (114), thence southeasterly six hundred and seventy-four (674) feet to said station number one hundred and fourteen (114), thence south and parallel to said highway seventy-seven hundred (7700) feet to station number thirty-seven (37), thence south 45 degrees east thirty-seven hundred feet (3700) to station number

zero (0), the same being on high water line, thence south fifty-nine (59) degrees thirty-six (36) minutes east four hundred and fifty (450) feet, thence south thirty-one (31) degrees, 85 east to the Big Sioux River, the said line being the center line of said drainage ditch and is intended to cover the exact location of drainage ditch number 1 as now established and constructed.

Section Two.

Commencing at a point ten hundred and thirty-five feet (1035) north and fifty-eight (58) feet west of the southeast corner of section twenty-nine (29), in township one hundred and two (102) of range forty-nine (49), the same being the commencement point of section one (1), hereinbefore described running thence north five hundred and forty-seven (547) feet; thence north twenty-three (23) degrees west three thousand three hundred and eighteen (3318) feet to a point fifty-eight (58) feet west of the quarter quarter line in the northeast quarter of section [twenty-nine] (29) in said township, thence north parallel with and fifty-eight (58) feet west of said quarter quarter line through sections twenty-nine (29), twenty (20), seventeen (17) and a part of section eight (8), twelve thousand nine hundred and thirty-five (12,935) feet; thence north fifty (50) degrees east twenty-seven hundred and thirty two (2732) feet to a point thirty-three (33) feet west of the west line of the right of way to the Chicago, Milwaukee & St. Paul Railway Company in the northwest quarter of section (9), in said township; thence northerly parallel with and thirty-three (33) feet west of said right of way line nineteen thousand three hundred and sixty-eight (19,368) feet to a connection with a high water channel of the Big Sioux River in the southeast quarter of section twenty (20) in township one hundred and three (103) north of range forty-nine (49).

Section Three.

Commencing at a point sixteen hundred and forty (1640) feet east of the center of section eighteen (18) in township one hundred and three (103), range forty-nine (49) running thence north thirty-three (33) degrees west thirty-one hundred and fifty-five (3155) feet to a point sixty (60) feet west of the quarter corner between sections seven (7) and eight (8) in said township; thence north parallel with and sixty (60) feet west of the quarter line in sections seven (7) and six (6) in said township and in section thirty-one (31) in township one hundred and four (104) north

of range forty-nine (49) to the center line running east and west through said section thirty-one (31); thence northeasterly to the creek near the northeast corner of said section thirty-one (31). The said line being the center line of said proposed drainage ditch.

That in addition thereto the Big Sioux river is to be straightened in sections seventeen (17), eighteen (18) and twenty (20) in township one hundred and three (103) north of range forty-nine (49) in order to afford better means of communication between the lower end of section three (3) of said ditch and the upper end of section two (2) thereof; the same being intended to cover the exact location of drainage ditch number 2 as now established and constructed.

I further recommend that the Big Sioux river be straightened on section thirty-two (32), township one hundred and three (103) north of range forty-nine (49) west by the construction of a cut off beginning at the intersection of the center line of the highway bridge across the Big Sioux river, on the town line between sections thirty-two (32), township one hundred and three (103), range forty-nine (49) and section five (5), township one hundred and two (102), range forty-nine (49) and the center line of said river; thence northerly at right angles to said bridge two hundred (200) feet; thence
87 northwesterly at an angle of twenty (20) degrees to the west, nine hundred and fifty (950) feet; thence northerly at an angle of nineteen (19) degrees to the east twenty-eight hundred and fifty (2850) feet to the center of said river.

I further recommend that the Big Sioux river be straightened on section eight (8), township one hundred and two (102) range forty-nine (49) by the construction of a cut off beginning at a point in the center line of the Big Sioux river, twenty-one hundred and seventy (2170) feet easterly and seven hundred and eighty-five (785) feet southerly from the northwest corner of section eight (8) township one hundred and two (102), range forty-nine (49); thence easterly parallel with the north line of said section eight (8) three hundred feet; thence northeasterly at an angle of twenty degrees (20) to the north, four hundred (400) feet, to the center of said river.

I further recommend that the Big Sioux river be straightened on section eight (8) township one hundred and two (102) range forty-nine by the construction of a cut off beginning at the intersection of the center line of the Big Sioux river and the east and west quarter line of section eight (8), township

one hundred and two (102), range forty-nine (49); thence northerly at an angle of forty-one (41) degrees and thirty (30) minutes to the north eight hundred (800) feet; thence northwesterly at an angle of seventy-five (75) degrees to the west five hundred and fifty (550) feet to the center of said river.

I further recommend that the Big Sioux river be straightened on section seventeen (17), township one hundred and two (102), range forty-nine (49) by the construction of a cut off beginning at a point in the center of the Big Sioux river seven hundred and twenty (720) feet southerly and six hundred and twenty (620) feet easterly from the west quarter post
88 of section seventeen (17) township one hundred and two (102), range forty-nine (49); thence northerly parallel with the westerly line of said section seventeen (17) six hundred (600) feet; thence northwesterly at an angle of twenty-nine (29) degrees to the west fourteen hundred and ten (1410) feet; thence northerly at an angle of twenty-nine (29) degrees to the east fifteen hundred and sixty (1560) feet; thence north-easterly at an angle of fifty-five degrees (55) to the east eight hundred and seventy (870) feet to the center of said river.

I further recommend that the Big Sioux river be straightened on section twenty (20), township one hundred and two (102) range forty-nine (49), by the construction of a cut off beginning at the intersection of the center line of the Big Sioux river and the north line of section twenty (20), township one hundred and two (102), range forty-nine (49), thence southeasterly at an angle of one hundred and thirteen (113) degrees to the east six hundred and ten (610) feet; thence southwesterly at an angle of thirty-one (31) degrees to the west ten hundred and eighty (1080) feet; thence southwesterly at an angle of twenty-one (21) degrees to the west thirteen hundred and eighty (1380) feet to the center of said river.

Also in said section twenty (20) beginning at the intersection of the center line of Big Sioux river and the south line of section twenty (20), township one hundred and two (102) range forty-nine (49); thence northwesterly at an angle of sixty-two and one-half ($62\frac{1}{2}$) degrees to the north twenty-one hundred and ten (2110) feet; thence northerly at an angle of twenty-eight (28) degrees to the east five hundred (500)
89 feet to the center of said river.

I further recommend that the Big Sioux River be straightened on section twenty-nine (29) township one hundred and two (102) range forty-nine (49) by the construction

of a cut off beginning at the intersection of the center line of the Big Sioux river and the north line of section twenty-nine (29) township one hundred and two (102), range forty-nine (49); thence southerly at an angle of 81 degrees to the south twenty-nine hundred and ninety (2990) feet; thence south-easterly at an angle of thirty-five (35) degrees to the east ten hundred and ninety (1090) feet; thence southerly at an angle of thirty-seven and one-half ($37\frac{1}{2}$) degrees to the west eleven hundred (1100) feet, to the center of said river.

All of the above cut-offs to have a bottom width of sixty (60) feet and side slopes of one and one-half ($1\frac{1}{2}$) to one (1). A right of way one hundred (100) feet in width, one-half each side of the above described center lines will be required.

The tract of country likely to be affected by the establishment and construction of the said proposed drainage is in general terms described as follows: Sections four (4), five (5), six (6), seven (7), eight (8), nine (9), sixteen (16), seventeen (17), eighteen (18), nineteen (19), twenty-two (22), twenty-seven (27), thirty (30), thirty-one (31), thirty-two (32), thirty-three (33), thirty-four (34), in township one hundred and one (101) of range forty-nine (49); sections thirteen (13), twenty-four (24) and twenty-five (25) in township one hundred and one (101), range fifty (50); sections three (3), four (4), five (5), eight (8), nine (9), sixteen (16), seventeen (17), eighteen (18), nineteen (19), twenty (20), twenty-one (21), twenty-eight (28), twenty-nine (29), thirty-one (31), thirty-two (32) and thirty-three (33) in township one hundred and two (102), range forty-nine (49); sections five (5), six (6), seven (7), eight (8), nine (9), sixteen (16), seventeen (17), eighteen (18), twenty (20), twenty-one (21), twenty-seven (27), twenty-eight (28), twenty-nine (29), thirty-two (32), thirty-three (33) and thirty-four (34) in township one hundred and three (103), range forty-nine (49); sections twenty-nine (29), thirty-one (31) and thirty-two (32) in township one hundred and four (104), range forty-nine (49), including also the mill property at or near the town of Baltic and the tracts of country covered by the right of flowage belonging to said mill property. Also the following additions to the City of Sioux Falls, Minnehaha County, South Dakota; North Boulevard addition, Carpenter's addition, Central Park addition, Meredith's First Addition, Meredith's Second addition, Harrison's addition, Lincoln Park addition, Englewood addition, West Lawn addition, Sioux Falls Improvements Company's addition, North Park Addition, North Park

Second addition, Brooks' addition, Bunker's addition, Lake View addition, Brookings addition, Berwick addition, Summit addition, McClellan's Second addition, West Park addition, Pettigrew & Tate's Eighth addition, Glendale addition, Scott's Second addition, Morningside addition, Van Eps' addition, Millspaugh's addition, Daniels' addition, Morse's addition, Gale's addition, Gale's Sioux Falls, Phillips' addition, Syndicate addition, Central addition and W. R. Green addition.

The separate tracts of land through which said proposed ditch will pass and parts of which will be required therefore and for dump space, and the names of the owners of said tracts as appears from the records in the office of the 91 register of deeds of said county on August 3rd, 1916, that being the date of filing said petition, are as follows:

Owner	Description	Township	Range
Lars Simonson	NW $\frac{1}{4}$ of NW $\frac{1}{4}$	Sec. 32	
Lars Simonson	NE $\frac{1}{4}$ of NE $\frac{1}{4}$	" 31	104
Lars Simonson	SE $\frac{1}{4}$ NE $\frac{1}{4}$	" 31	104
Gustava Nelson	SW $\frac{1}{4}$ of NE $\frac{1}{4}$	" 31	104
P. G. Thompson	E $\frac{1}{2}$ of SW $\frac{1}{4}$	" 31	104
Julia L. Moe	NW $\frac{1}{4}$ of SE $\frac{1}{4}$	" 31	104
Even O. Fossum	NE $\frac{1}{4}$ of NW $\frac{1}{4}$	" 6	104
Gunerius Thompson	All that part of SE $\frac{1}{4}$ of NW $\frac{1}{4}$ Sec. 6	103	49
	lying south of a certain slough running West of Northwest to end of drain ditch	103	49
E. P. Sorkilmo	All that Part of SE $\frac{1}{4}$ of NW $\frac{1}{4}$ Sec. 6 located & lying on the north side of a certain intermittent water-course or slough running through the center of said section in a northwesterly course to ditch on the west line of said "40" except the N $\frac{1}{2}$ of N $\frac{1}{2}$ of said SE $\frac{1}{4}$,	103	49
Lina Hanson,	N $\frac{1}{2}$ N $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 6,	103	49
Gunerius Thompson	E $\frac{1}{2}$ of SW $\frac{1}{4}$ Sec. 6	103	49
Ole J. Ustrud	E $\frac{1}{2}$ of NW $\frac{1}{4}$ Sec. 7	103	49
Magnhild Floren, Olaf	E $\frac{1}{2}$ of SW $\frac{1}{4}$ Sec. 7	103	49
Berthum Floren,			
Mabel Floren & Ovida			
Mathilda Floren			
Andrew Swenson Aas	E $\frac{1}{2}$ of NW $\frac{1}{4}$ Sec. 18	103	49
John O. Aasen	S $\frac{1}{2}$ of NE $\frac{1}{4}$ Section 18	103	49
B. G. Flamoe	NE $\frac{1}{4}$ of NW $\frac{1}{4}$ Sec. 20	103	49
Bernt G. Flamoe	SE $\frac{1}{4}$ of NW $\frac{1}{4}$ Sec. 20	103	49
Peter Paulson,	E $\frac{1}{2}$ of SE $\frac{1}{4}$ Sec. 20	103	49

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Owner	Description	Township	Range
Olymprious S. Thompson	Tract 3 of County Auditor's Subdivision of the NE $\frac{1}{4}$ of Sec. 29	103	49
Olymprious S. Thompson	SE $\frac{1}{4}$ of NW $\frac{1}{4}$ and W $\frac{1}{2}$ of SW $\frac{1}{4}$ of Sec. 28	103	49
Bertha Peterson, Alice, Christina Thompson, John Oscar Thompson, William Henry Thompson, Fred Raymond Thompson, Reuben Victor Thompson, Mabel Josephine Thompson, Carl Melvin			
Thompson	SW $\frac{1}{4}$ of NW $\frac{1}{4}$	Sec. 33	103
Andrew J. Aason	NW $\frac{1}{4}$ of NW $\frac{1}{4}$	" 33	103
Joseph C. Thompson	NW $\frac{1}{4}$ of SW $\frac{1}{4}$	" 33	103
Thomas Hendrickson	SW $\frac{1}{4}$ of SW $\frac{1}{4}$	" 33	103
Ole Thompson Aspass	W $\frac{1}{2}$ of NW $\frac{1}{4}$	" 4	102
Martin H. Oyen and Cleopatra H. Oyen	W $\frac{1}{2}$ of SW $\frac{1}{4}$	" 4	102
Martin Oien	W $\frac{1}{2}$ of NW $\frac{1}{4}$	" 9	102
Martin H. Oien	SE $\frac{1}{4}$ of NW $\frac{1}{4}$	" 8	102
Ole Gunderson	W $\frac{1}{2}$ of SE $\frac{1}{4}$	" 8	102
Leonard Renner	E $\frac{1}{2}$ of SE $\frac{1}{4}$	" 8	102
Ingeberg Peterson			
Peter R. Peterson			
Iver R. Peterson			
Gertie R. Peterson,	W $\frac{1}{2}$ of NE $\frac{1}{4}$	" 17	102
Christian J. Orstad	W $\frac{1}{2}$ of SE $\frac{1}{4}$	" 17	102
Albert N. Allis	W $\frac{1}{2}$ of NE $\frac{1}{4}$	" 20	102
Robert J. Huston	W $\frac{1}{2}$ of SE $\frac{1}{4}$	" 20	102
Charles E. Kaufmann,	NE $\frac{1}{4}$ & NE $\frac{1}{4}$ of SE $\frac{1}{4}$ of Section 29	102	49
State of South Dakota	SE $\frac{1}{4}$ of SE $\frac{1}{4}$	Sec. 29	102
State of South Dakota	E $\frac{1}{2}$ of NE $\frac{1}{4}$ & NE $\frac{1}{4}$ of SE $\frac{1}{4}$	" 32	102
Hans Ruvald	SE $\frac{1}{4}$ of SE $\frac{1}{4}$	" 32	102

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Owners	Description	Township	Range
Hans Ruvald	E $\frac{1}{2}$ of NE $\frac{1}{4}$ & NE $\frac{1}{4}$ of SE $\frac{1}{4}$	" 5	101
City of Sioux Falls	Starting at Southwest corner of Section 4, running thence east along Sec. line to the center line of County Ditch #1 as shown on Map #3 of the recorded plat of said ditch, thence in a northwesterly direction along the center line of said ditch to the west line of Sec. 4 thence south along said section line to the place of beginning	101	49

State of South Dakota SW $\frac{1}{4}$ of Sec. 4, except above described tract		101	49
Southern Minnesota Railway Extension Company (Now Chicago Milwaukee & St. Paul Railway Company) Right of way across the SW $\frac{1}{4}$ of SW $\frac{1}{4}$ Sec. 4		101	49
Watertown & Sioux Falls Railway Company Right of Way across the Falls Railway Company SW $\frac{1}{4}$ of SW $\frac{1}{4}$ Sec. 4		101	49
Watertown & Sioux Falls Railway Company Right of Way across the East Falls Railway Company $\frac{1}{2}$ of SE $\frac{1}{4}$ Sec. 5,		101	49
Chicago, Milwaukee & St. Paul Railway Company Right of Way of Madison Branch, on Sections 8 and 9,		102	49
Mapleton Township Interest in Highway adjacent to the line of the proposed ditch in Sections 4, 8, 9, 17, 20 and 29		102	49
Sverdrup Township Interest in Highways adjacent to the line of the proposed ditch in Sections 6, 7, 18, 20, 28, 29 and 33.		103	49
Dell Rapids Township Interest in Highways adjacent to the line of the proposed ditch in Sections 29, 30, 31 and 32.		104	49
Sioux Falls Township Interest in Highways adjacent to the line of the proposed ditch in Sections 4 and 5 and 9		101	49

Berwick Addition to Sioux Falls

	Lot No.	Block No.
Elwin L. Potter	1, 2 and 3	5
Arthur D. Horton	5, 6, 7, 8, 9, 10 and 11	4
State of South Dakota	1, 2 and 3	13
Grant Lines	5, 6, 10 and 11 lying east of Drainage Ditch	14
State of South Dakota	7, 8, and 9	14
State of South Dakota	1, 2 and 3	19
Sophia Krull,	4	18
Sophia Krull, Emma Buchholz, Mary Toepfer, Charles Krull, William F. Krull and Otto R. Krull	5 and 6	18
Sophia Krull	7, 8, 10, 11	18
George W. Hanson (Fee) Security Savings Bank (Tax title)	9	18

Moses M. Robinson	1	31
Security Savings Bank	2 & 8	31
James Kennedy	3	31
Security Savings Bank	All of Block	32
*	*	*

The Kittery Realty Company—Tract 2 of NE $\frac{1}{4}$ Section 9, Twp. 101, Rge. 49.

The Kittery Realty Company—Tract 3 of NE $\frac{1}{4}$ Sec. 9 Twp. 101 Rge. 49.

State of South Dakota: Tract 3 of NW $\frac{1}{4}$ Sec. 9, Twp. 101 Rge. 49.

95 The separate tracts of land wherein the Big Sioux River is proposed to be constructed and which will likely be affected thereby and the names of the owners of said tracts as appear from the records of the office of the Register of deeds of said County on August 3rd, 1916, that being the date of the filing of said petition, are as follows:

Name of Owner.	Description	Township	Range
Andrew J. Aasen,	W $\frac{1}{2}$ NE $\frac{1}{4}$ Section 32	103	49
Andrew J. Aasen	NE $\frac{1}{4}$ of NE $\frac{1}{4}$ Sec. 32	103	49
Joseph O. Thompson,	S $\frac{1}{2}$ of SE $\frac{1}{4}$ of NE $\frac{1}{4}$ Section 32.	103	49
Gus S. Thompson,	N $\frac{1}{2}$ of SE $\frac{1}{4}$ of NE $\frac{1}{4}$ Section 32.	103	49
Jonas L. Finnegan,	N $\frac{1}{2}$ of SE $\frac{1}{4}$ of Sec. 32.	103	49
Margaret Finnegan,	SE $\frac{1}{4}$ of SE $\frac{1}{4}$ Sec. 32.	103	49
John Finnegan,	SW $\frac{1}{4}$ of SE $\frac{1}{4}$ Sec. 32	103	49
Ole Gunderson,	NW $\frac{1}{4}$ Sec. 8	102	49
Iver Nelson,	NW $\frac{1}{4}$ of SW $\frac{1}{4}$ Sec. 8.	102	49
Jonas Olson,	SW $\frac{1}{4}$ of SW $\frac{1}{4}$ Sec. 8.	102	49
Ole Gunderson,	E $\frac{1}{2}$ of SW $\frac{1}{4}$ Sec. 8,	102	49
Iver R. and Palma Peterson,	NW $\frac{1}{4}$ of NW $\frac{1}{4}$ of Sec. 17	102	49
Bernt Mekvold,	SW $\frac{1}{4}$ of NW $\frac{1}{4}$ Sec. 17	102	49
C. C. Fleischer,	NW $\frac{1}{4}$ of SW $\frac{1}{4}$ Sec. 17.	102	49
Iver R. and Palma Peterson,	East 26 acres of NE $\frac{1}{4}$ of NE $\frac{1}{4}$ Sec. 18	102	49
Bernt Mekvold,	SE $\frac{1}{4}$ of NE $\frac{1}{4}$ Sec. 18	102	49
W. O. Quincy,	W $\frac{1}{2}$ of NW $\frac{1}{4}$ Sec. 20	102	49

Albert N. Allis,	E $\frac{1}{2}$ of NW $\frac{1}{4}$ Sec. 20,	102	49
Robert J. Huston	N $\frac{1}{2}$ of SW $\frac{1}{4}$ Sec. 20.	102	49
Charles Kaufmann,	S $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 20.	102	49
Charles Kaufmann,	W $\frac{1}{2}$ of NE $\frac{1}{4}$ Sec. 29	102	49
96			

Name of Owner	Description	Township	Range
Charles Kaufmann,	NE $\frac{1}{4}$ of NW $\frac{1}{4}$ Sec. 29	102	49
Ole P. and Maria Schjodt	W $\frac{1}{2}$ of SE $\frac{1}{4}$ Sec. 29	102	49
Berit Johnson,	NE $\frac{1}{4}$ of SW $\frac{1}{4}$ Sec. 29	102	49

In addition to the above, notice is also given to Minnehaha County, Townships of Sioux Falls, Mapleton, Sverdrup, and Dell Rapids in said County and the City of Sioux Falls in said County on account of benefits to highways, bridges, parks and city waterworks plant in the said drainage area and notice is also given to the Chicago, Milwaukee & St. Paul Railway Company, also to the Watertown & Sioux Falls Railway Company on account of the benefits to their rights of way within said drainage area;

All persons affected by said proposed drainage are hereby summoned to appear at said hearing and show cause, if any they have why the said drainage should not be established and constructed;

And all persons deeming themselves damaged by said proposed drainage or claiming compensation for the lands proposed to be taken for said drainage are hereby summoned to present their claims therefor at said hearing.

Reference is hereby made to the files in said proceedings for further particulars.

Dated this 15th day of September A. D. 1916.

THE BOARD OF COUNTY
COMMISSIONERS,
By: A. G. Risty, Chairman.

Attest:

(Seal) Harry H. Howe, County Auditor
By E. H. Shenkle Deputy.

Filed in the office of the Auditor of Minnehaha County, S. D., this 15 day of Sept., 1916.

HARRY H. HOWE, County Auditor,
By E. H. Shenkle, Deputy.

98 (Order directed to defendants to show cause why plaintiff should not be permitted to amend bill of complaint.)

A motion having been made in this court by the plaintiff in the above entitled action, to be allowed to make an amendment to its original bill in equity herein by adding thereto a paragraph to be numbered 18½ fully set out in said motion, in order to make the bill conform to the facts proven upon the trial of the said action, and the plaintiff having petitioned this court for an order to show cause upon the defendants and their attorneys and the interveners and their attorneys, why the amendment should not be allowed and paragraph 18½ added to the bill of complaint of the plaintiff herein; and it appearing to the satisfaction of the court that a large amount of evidence was offered and received upon the trial of the said action along the line of the proposed amendment
99 upon the understanding of all parties at the time that the matters set out in the amendment were sufficiently pleaded in the original bill.

It is Therefore Ordered that the defendants and each of them and the interveners and each of them and their attorneys, E. O. Jones and Porter & Bartlett, show cause before this court at the City of Sioux Falls, Minnehaha County, South Dakota, on the 31 day of January, 1922, at the hour of ten o'clock in the forenoon, why the proposed amendment to the bill of the plaintiff herein should not be allowed.

It Is Further Ordered that this order to show cause, the motion to amend, the proposed amendment and the affidavits filed herein be served upon attorneys for defendants and interveners forthwith.

Done this 28 day of January, 1922.

By the Court:

JAS. D. ELLIOTT,
Judge.

(Seal of Court)

Attest:

Jerry Carlton,
Clerk.

Due service of the within order this 28th day of Jan., 1922 is hereby admitted.—E. O. Jones, Attorney for Defendants.
—Due service of the within order this 28 day of Jan., 1922

is hereby admitted.—Porter & Bartlett, Attorney for Interveners.

100 Endorsed: Filed in the District Court Jan. 28, 1922,
at 4:30 P. M.

101 (Affidavit of A. B. Fairbank in support of order to
show cause.)

State of South Dakota,
County of Minnehaha—ss.

A. B. Fairbank, being duly sworn, on oath says that he is one of the attorneys for the plaintiff in the above entitled action and that he prepared the bill in equity in the said action and had charge of the trial thereof. That upon the trial of the said action a large amount of evidence was offered both by the plaintiff and by the defendants, which showed that the equalization of benefits which was made by the Board of County Commissioners of Minnehaha County, South Dakota, on the 10th day of June, 1921, against 102 the property of the Chicago, Rock Island & Pacific Railway Company was made without any reasonable or rational methods for determining benefits against the railroad property. That it was purely speculative, arbitrary, unjust to the railroad company and discriminatory against the railroad company.

That when this evidence was offered by the plaintiff it was objected to by the defendants and was admitted over their objection. That the court was of the opinion at the time and so were the attorneys for the plaintiff that the bill of complaint filed herein sufficiently alleged the facts to admit of the introduction of this evidence. That the bills are very voluminous and were not thoroughly examined either by the court or the attorneys for the plaintiff and defendants at the time, but that it was assumed that they were sufficient in their allegations to cover this line of evidence. That after the trial was completed the bill was thoroughly examined by affiant in preparing brief and that affiant discovered that the allegations upon this proposition were somewhat vague and not clear and specific and that there was some doubt as to their sufficiency to admit of the receipt of the evidence which had been offered and received. That the allegations now sought to be added to the bill were left out by this affiant by mistake and inadvertence in the proportion of the said bill and that it was the opinion of the plaintiff and of all the other attorneys in the case at the

time the case was tried that the allegations now sought to be made were in substance alleged in the complaint and the evidence was offered and received upon that understanding. That affiant believes that the evidence was competent and material and that the plaintiffs are clearly entitled to such proof and that in order to remove any doubt as to the sufficiency of the allegations of the bill to admit such evidence affiant now asks

that he be allowed to make an amendment to his original
103 bill in equity herein by adding one paragraph numbered
18½, which is set forth in full in plaintiff's motion.

Affiant further says that the defendants in this case offered full and complete evidence upon the issue thus raised and that all the evidence upon the issue is now before the court, and that the said amendment would not deprive the defendants of any right or call for the introduction of any further evidence by either party.

Wherefore, plaintiff prays that an order to show cause issue out of this court directing the defendants and their attorneys to appear before the court and show cause at a time and place to be fixed by the court why the plaintiff should not be allowed to make an amendment to his bill in equity in this action by adding thereto paragraph 18½ as set forth in the motion.

Dated this 28th day of January, 1922.

A. B. FAIRBANK.

Subscribed and sworn to before me this 28th day of January,
1922.

(Notarial Seal)

F. G. WARREN,
Notary Public.

Due service of the within motion this 28th day of Jan. 1922
is hereby admitted,

PORTER & BARTLETT,
Attorneys for Intervenors.

104 Service of the within order this 28th day of Jan. 1922 is
hereby admitted.

E. O. JONES,
Attorney for Defendants.

Endorsed: Filed in the District Court on Jan. 28, 1922,
at 4:30 P. M.

106 (Return of defendants to order to show cause why plaintiff should not be permitted to amend bill of complaint.)

Come now the defendants and intervening defendants, in the above entitled action and for return to the plaintiff's Order to Show Cause, issued hereon, on January 28, 1922, say that the plaintiffs said Motion should be denied and the prayer of the plaintiff to amend its bill be denied for the following reasons:

1. That said offer to amend comes too late, and after the entire case has been tried, argued and brief submitted.

2. That the same injects an entirely new cause of action into the bill of complaint which will require a new trial and additional evidence upon the hearing upon the same; the only evidence heretofore introduced going only to the application of the rule for the apportionment of benefits, and that the statute furnishes a determinable basis for the apportionment of benefits upon railroad and other property.

3. That the proposed amendment does not conform to the facts proven in the following particulars:

(a) That the proposed amendment assumes that the board of county commissioners were acting under jurisdiction obtained in the establishment of old Drainage Ditches No. 1 and No. 2, instead of the new drainage proceedings designated as Drainage Ditch No. 1 and 2.

107 (b) That the proposed amendment further assumes that "the equalization of the proportion of benefits" has been made, whereas, the proof shows that merely the tentative fixing of the apportionment of benefits has been made and that no equalization has been made on bearing upon equalization had.

(c) The proposed amendment assumes that the plaintiffs property "has not been and can never be benefited", etc, by old drainage ditches No. 1 and No. 2, while the evidence shows a substantial benefit under Drainage Ditch No. 1 and 2.

(d) The proposed amendment assumes "that the said assessment is so arbitrary, etc., as to deprive the plaintiff of its property without due process of law" while the evidence shows that no "assessment" or "equalization of benefits" has been made or attempted, and under the drainage law no such assessment can be made until after the proportion of benefits has been equalized and finally fixed.

(e) The proposed amendment assumes that the board of county commissioners will act arbitrarily in this matter, and not according to the proofs submitted.

4. That the amendment does not attack the drainage law as arbitrary or the unit provided by the law as arbitrary, but alleges that the acts of the board in fixing the proportion of benefits is arbitrary, speculative and unjust, whereas the proof shows the board, with its engineer, personally inspected the property affected and exercised its honest judgment as to the benefits received, and the undisputed evidence further shows that some benefits [was] received. And where there are disputable grounds of discretion or disputable degrees of benefit it cannot be said that such proof establishes arbitrary action.

5. Under the drainage law the board of county commissioners are created the initial tribunal with exclusive jurisdiction to determine the questions presented by the proposed amendment and an appeal to the state courts is provided from such determination by anyone deeming themselves aggrieved, which provides due process of law and gives the plaintiffs equal protection of the laws.

For all of which reason the defendants insist that the Motion of the plaintiff be dismissed.

E. O. JONES
Attorneys for Defendants.

PORTER & BARTLETT
Attorneys for Intervening Defendants..

Endorsed: Filed in the District Court on Jan. 31, 1922.

109 (Affidavit of E. O. Jones, and N. B. Bartlett in support of return to order to show cause.)

State of South Dakota,
County of Minnehaha—ss.

E. O. JONES and N. B. BARTLETT, being first duly sworn on oath, depose and say: That they are the solicitors for the defendants and intervening defendants above named and that they as such, draw the answers for said defendants to plaintiff's bill of complaint herein, and have had charge of the preparation and trial of the issues in the above matter; that the bill of complaint herein was filed in the above named

court on July 25, 1921, and that the answers of the above named defendants and intervening defendants were filed in the above named court on September 1, 1921. That upon the hearing of plaintiff's order to show cause why an interlocutory injunction should not be granted, heard before three judges in this court on or about November 28, 1921, affiants, in presence of plaintiff's attorneys, read to said court a part of plaintiff's bill of complaint herein, wherein plaintiff attempted to set forth its jurisdictional grounds and its purported constitutional question raised by said pleadings and at that time affiants stated in open court, in the presence of plaintiff's attorneys, that the bill of complaint herein did not allege fraud or arbitrary action on the part of the defendant Board of County Commissioners; that notwithstanding said 110 statement in open court, said plaintiff offered no amendment to its bill of complaint, nor did it contradict the statement of affiant nor call the court's attention to any allegation in its complaint wherein the same contained allegations of fraud or arbitrary action on the part of said Board of County Commissioners, nor did they at said time, or at all, state to said court that they were of the opinion that said bill contained any such averments, or that they were relying thereon in this cause of action, nor is there any showing before this Court now that plaintiff ever intended at any time prior to this motion, to raise by its bill the question of arbitrary action by the Board.

That on December 15, 1921, said matter came on for final determination before the above named court, and upon the first day of said hearing, affiants objected to the evidence offered by plaintiffs purporting to show that the plaintiff was not benefited by Drainage Ditch No. 1 and 2, and, among other grounds, stated at said objection, objected to said testimony for the reason that neither fraud nor arbitrary action was alleged in the bills of complaint, which objections are hereto attached, hereby referred to and made a part hereof. That at said time, the Honorable James D. Elliott, presiding judge, overruled said objection pro forma and stated in open court that after the trial of said cause, he would take said objections and decide them in the order in which they were presented, and at said time stated in substance to plaintiff's counsel that he assumed that they had alleged that the action of the Board in fixing the apportionment was arbitrary and asked plaintiff's counsel if that were true, but that plaintiff's counsel, to the best of your affiants knowledge and belief, did not reply to said question, although plaintiff's counsel at said time

did examine its bill of complaint and attempted to find such allegations therein. That said trial proceeded upon the
111 15th, 16th and 17th of December, and all of which evidence on behalf of the plaintiff was received over the foregoing objections of the defendants as hereinbefore set forth, and during all of said time, plaintiff's counsel had due notice of, and was informed of the state of its pleadings. That thereafter, and on December 20, 1921, said matter was orally argued before Honorable James D. Elliott, presiding judge of the above named court, at which time affiant again read to said court the allegations in plaintiff's bill of complaint, setting forth its jurisdictional grounds and the constitutional questions raised, and again stated in open court that said bill of complaint contained no allegation of fraud or arbitrary or confiscatory action on behalf of the defendant Board of County Commissioners. That said plaintiff again neglected, failed and refused to offer an amendment to its bill of complaint, although duly informed of the contents thereof. That at said time, affiants distinctly called to the court's attention the allegations of plaintiff's bill, wherein it is alleged: "That said statute Exhibit "A" is further void and unconstitutional in that the same provides no fixed and determinable method or rule for the apportionment of benefits upon the property and property holders situated within the drainage area and furnishes no fixed or determinable basis for the apportionment of benefits upon the property of railroad companies" and stated to said court that said allegations did not constitute an averment of arbitrary action on the part of the Board of County Commissioners. That notwithstanding these statements in open court at the time of said argument on December 20, 1921, said plaintiff failed and neglected to offer an amendment and failed and neglected to state to the court at said time, or to contend orally at said time that said bill of complaint contained any allegations of arbitrary action on the part of said defendant Board of Commissioners.
112 That said plaintiff's brief herein was filed on or prior to December 30, 1921, and that more than thirty days elapsed after the filing of said brief before said plaintiff complained that said bill of complaint was deficient and moved to amend the same. And affiants verily believe that the plaintiff never intended to allege that the actions of the Board of County Commissioners herein, were arbitrary, nor has he at any time stated in any manner, prior to the present time, that he ever intended to raise the issues presented by his proposed amendment by said bill of complaint herein.

Affiant further says that no evidence has been offered herein showing or tending to show that the equalization of benefits has ever been made by the Board of County Commissioners. That the evidence offered on the part of the plaintiff to show that the plaintiff was not benefited thereon was objected to by the defendants at the time the offer was made, which objections are hereto attached and made a part hereof, and said objections gave notice to the plaintiff that his bill did not contain any averment of arbitrary action on the part of said Board of County Commissioners, and said plaintiff neglected and failed to immediately offer an amendment to his said bill when the same was thereby objected to.

That the evidence offered by the plaintiff and by which the said plaintiff is bound does not support the proposed amendment and is substantially as follows: That the taking of the water out of the river into the ditch at a place known as Thompsons, about twelve miles north of Sioux Falls, and by-passing the same through the ditch, again returning it to the river at the spillway, is of benefit to all land and property affected adjacent to the river in that stretch of the river; that the ditch carries and by-passes from one-third to one-half of the flood water in the Sioux valley and therefore relieves the valley and the lands therein of flood water in from one-third to one-half less time than it would otherwise take to relieve said land from said flood waters along that stretch of the river.

That the plaintiff herein is the owner of a right of way commonly known as acreage land within the stretch of the river so benefited which is adjacent to other acreage land in the benefited district, and is like affected and benefited and like apportioned as such other acreage land. That the Board of County Commissioners had a topographical survey made of the property affected by this drainage ditch included in which is the plaintiff's property. That thereafter, the Board of County Commissioners and its engineer made a personal careful inspection of plaintiff's property and found that the acreage land owned by plaintiff was benefited to the same extent and in the same manner that adjoining acreage property was benefited, and apportioned its benefit accordingly, and found further and it was their judgment that the embankments, bridges and culverts on plaintiff's property were also benefited. That the same unit of benefit that was used and applied to acreage land in general was applied to this plaintiff's acreage land and also applied to the capitalized benefits to the embankment, bridges and culverts of this plain-

tiff in the same manner as it was applied to other like property within the drainage area. That Drainage Ditch No. 1 and Drainage Ditch No. 2 have been entirely completed and abandoned and are not a part of the present ditch project and that Drainage Ditch No. 1 and 2, now in controversy is an entire separate and distinct drainage project from Drainage Ditch No. 1 and Drainage Ditch No. 2.

There being no allegation of arbitrary action on the part of said Board of County Commissioners, the defendants herein did not prepare and try said case upon said issues and it such be now made a part of the bill of complaint herein, it will be necessary to introduce additional evidence to justify the proportionment made by the Board. That the defendants will be compelled to and are prepared to show by competent evidence that the right-of-way of the plaintiff company upon which the apportionment was fixed herein has been flooded

114 in the past and prior to the completion of Drainage Ditch No. 1 and 2 and grade weakened to such an extent by reason of said waters along the same, that the action of said waters thereon increased the maintenance thereof, and that since the completion of said present drainage project, they have not suffered by reason of waters along their right-of-way, or upon their grades, and that the same has lessened the maintenance and upkeep of said grade and said railroad tracks. That since the establishment and construction of said drainage project plaintiff's bridges which it has over the river within said drainage area can be shortened and the approaches filled in, and that the plaintiff has already taken steps to shorten some of said bridges, and that the shortening of said bridges and the filling in of the approaches is a direct benefit to said plaintiff and is a resultant action of the taking away of from one-third to one-half of the flood waters by said drainage ditch project. That the defendants will be compelled to and will be prepared to establish by competent evidence that the Milwaukee Railroad bridge over the Sioux River in the City of Sioux Falls is only 205 feet long in the clear, and permits all the water now flowing in said river to pass thereunder; that the plaintiff's bridge within said city is not over 2000 above said Milwaukee bridge, is 615 feet in length and can safely be shortened to 268 feet and the approaches thereto filled thereby making a substantial saving to the plaintiff, all as a result of by-passing from one-third to one-half of the flood waters by this drainage project, away from said properties. That the only evidence that defendant offered in the trial of said case under

the pleadings was that the plaintiff enjoyed some benefit but that the defendants did not attempt to show the amount of benefit, and, therefore, the amount of apportionment of benefit which the plaintiff enjoyed to any particular part of its property. That if the amendments herein are allowed, it will

be necessary for the defendants to make such a showing
115 and to justify the apportionment of benefits as tentatively made by the Board of County Commissioners, and that in order to do this it will be necessary to open up said case and to have an entirely new and additional hearing. That the attempted amendment is an injection of an entirely new cause of action, and the same is not germane to the cause of action as stated in the bill, and changes the entire character of said cause of action and would be a gross abuse of this court's discretion.

That the return of the defendants hereto attached, is hereby referred to and made a part hereof.

E. O. JONES
N. B. BARTLETT

Subscribed and sworn to before me this 31st day of January, 1922.

(Notarial Seal)

R. A. BIELSKI,
Notary Public, South Dakota.

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Exhibit "A"

F. E. WARD, being called as a witness on behalf of the plaintiffs and being duly sworn, testified as follows:

Direct Examination

By Mr. Judge:

Mr. Bartlett: The defendants now move the Court that plaintiff's bills of complaint herein be dismissed and the restraining order set aside for the reasons that said bills of complaint fail to state any matter of equity entitling the plaintiff to the relief prayed for. Nor are the facts stated therein sufficient to entitle plaintiffs to any relief against these defendants.

For the further reason that this Court has no jurisdiction over these matters because the plaintiff's bills of complaint herein do not set forth any matter of equity in addition to the pretended constitutional question, said complaints not setting forth facts sufficient from which this Court can infer or

assume that there will result a multiplicity of suits, irreparable injury or a cloud cast upon the title of their property or any special circumstances to bring the cases under some recognized head of equity jurisdiction, it affirmatively appearing that plaintiffs have a plain, adequate and complete remedy at law.

For the further reason that it affirmatively appears from the face of the bills of complaint and record that there is no jurisdictional amount in controversy at this time and these actions are premature and that no assessment or tax has in fact been equalized, assessed or levied, and that the state tribunal having jurisdiction thereof was enjoined by these proceedings before it had opportunity to perform its statutory duties, equalize or determine or fix the amounts of benefits assessment or tax chargeable against the property of
117 the plaintiffs if any, and if the plaintiffs will establish that they received no benefits by reason of the ditch in controversy, as alleged in said bills, before the state tribunal appointed by law to equalize the apportionments of benefits, then no assessment or tax against their property will be made, and they can suffer no irreparable injury, multiplicity of suits, nor will any cloud be cast upon the title to their property.

For the further reason that the findings and determination of the State Tribunal upon questions of fact before them, are conclusive upon this Court in this action, this Court having no original jurisdiction by a bill in equity to reject or control the proceedings of that tribunal, the same being the Board of County Commissioners of Minnehaha County, South Dakota, in these ditch proceedings.

The Court: I am disposed to, allow you to proceed and make your records and overrule the motion at this time, pro forma, but with the understanding that the Court will take the questions of the case up in the order in which they are presented and determine them in future. I think it will be conducive to the interests of all parties to have your record perfected. The motion by the defendants is therefore denied at this time with an exception to the defendants.

Q. State your name.

Mr. Bartlett: At this time we object to the introduction of any testimony for the reasons and on the grounds urged in the motion to dismiss.

The Court: Same ruling.

118

Exhibit "B"

Mr. Bartlett: To the offer of those proceedings under this last stipulation starting with petition of Blackman concerning Drainage Ditch Nos. 1 and 2, the defendants offer no objection. As to the offer of the proceedings of Drainage Ditch No. 1 and Drainage Ditch No. 2, the defendants object to the offer for the reason the proceedings are incompetent and irrelevant to the issues in this case. The same touching and concerning a project not here in controversy, the controversy here being an attempt to enjoin further proceedings of the Board of County Commissioners relative to Drainage Ditch Nos. 1 and 2. For the further reason that the offer does not present a federal question nor a matter subject to inquiry before this court in these proceedings, and all offers of instruments up to the establishment of the ditch not being the best evidence.

The Court: It will be received subject to objection.

119

Exhibit "C"

C. M. BASSETT, Assistant Engineer of the Great Northern, on the stand, examined by Mr. Judge.

Mr. Judge: State the substance of that conversation.

Mr. Bartlett: Objected to as not binding on the defendant Commissioners.

The Court: Objection overruled.

A. We have two bridges within the area and he said Bridge 150.7 that that bridge was about the right size. The bridge 146.0 we could shorten approximately 323 feet, and that he had capitalized that amount, but I didn't get the exact figures. He figured on the amount saved by the shortening of the bridge.

Mr. Bartlett: At this time, if the Court please, the defendant objects and asks that the question be stricken, and objects to the testimony of this witness on behalf of the plaintiff, going to the proposition as to whether or not the plaintiffs are benefited or not by the drainage project, for the reason the same is incompetent, irrelevant and immaterial to the issues in the case, for the further reason that the evidence now shows that the Board of County Commissioners of Minnehaha County had jurisdiction of the subject matter in these proceedings and proceeded with the construction reconstruction and the

repair of the ditch in question. For the further reason that this Court has no original jurisdiction of the bill in equity to reject the method pursued by the Board of County Commissioners of Minnehaha County in the construction, reconstruction and repair of this ditch, and that the plaintiffs on the complaints herein have a plain, adequate and speedy remedy at law by appeal from the equalization arising from 120 proceedings taken by the Board of County Commissioners.

For the further reason that it calls for evidence of the facts the determination of which is in the exclusive jurisdiction of the Board of County Commissioners and has been decided by that tribunal, which decision is conclusive and cannot be inquired into by this Court. That it is an attempt to impeach the determination of that tribunal in this action without any allegation or proof of fraud or arbitrary action on the part of that tribunal. Is not within the issues of the case and not a proper subject of inquiry by these collateral proceedings and does not present a federal question.

May we have the record show that that objection goes to the testimony offered in behalf of the plaintiffs in these proceedings attacking the question of whether or not they are or are not benefited by the ditch proceedings?

The Court: Yes. The motion is denied. The testimony is received subject to objection.

121

Exhibit "D"

(At the close of plaintiff's case)

Mr. Bartlett: At this time, Your Honor, at the close of plaintiff's cases in chief, the defendant renews the motion to dismiss the bills of complaint in these cases and set aside the restraining order heretofore issued, for all the reasons and upon all the grounds urged in the motion made by the defendants at the beginning of these cases.

And for the further reason that the record now shows that notice of opportunity to be heard upon the amount or proportion of benefits these plaintiffs have received and the amount or proportion of assessment that will be made against their property for such benefits has been given, and that all the plaintiffs in these cases have a plain, adequate and speedy remedy at law.

For the further reason that the record now shows that the method of apportionment of benefits and assessments to be made thereon as provided by the laws of South Dakota and applied by the Board of County Commissioners in these cases based upon their judgment of values and benefits conferred to the property of these plaintiffs in these cases and others, is a standard method of apportionment, which will probably produce substantial justice generally, and the probability is that the parties will be taxed proportionately to each other and all others upon whom benefits are conferred by the method provided and employed as shown by the evidence in these cases, and will probably produce approximately correct general results.

For the further reason that the record now shows the Board of County Commissioners of Minnehaha County charged by the law of this state with the execution of 122 the drainage ditch law has jurisdiction to proceed in respect to the property within such drainage area, including the property of these plaintiffs in these actions. And if there have been any errors in the administration of the statute, the same do not involve the jurisdiction of that tribunal over the property of these plaintiffs and others, and the record does not indicate upon its face any departure from the requirements of the statute. Therefore this Court cannot inquire into these collateral proceedings and the same are not issues presenting federal questions.

The Court: The motion is denied pro forma, without prejudice to its renewal at the close of all the testimony.

Endorsed: Filed in the District Court on Jan. 31, 1922, at 10 A. M.

124 (Order permitting amendment to bill of complaint.)

The above entitled matter coming on for hearing on this 31st day of January, 1922, at ten o'clock A. M., upon the order heretofore issued to defendants and the intervening defendants to show cause why plaintiff should not be permitted to amend the bill herein to conform to the proof by adding an additional paragraph to the original bill, to be known as Paragraph 18½, as follows:

125

18½

That the equalization of benefits of 839.45 units out of a total number of units of 32,549.62, estimated in dollars and

cents at approximately Eight Thousand Dollars (\$8,000.00) fixed by the Board of County Commissioners of Minnehaha County, South Dakota, on the 10th day of June, 1921, against the property of the Chicago, Rock Island & Pacific Railway Company, as above set forth, is wholly speculative, arbitrary, unjust, illegal and discriminatory and was made by the Board of County Commissioners without any reasonable or rational basis therefor, and is not in proportion to any benefit which the property of the plaintiff has received or ever can receive by reason of the rebuilding of the spillway, the cleaning out, repairing and maintaining of Drainage Ditch No. 1 and Drainage Ditch No. 2, as set forth herein; that the property of the plaintiff has not and never can be benefitted by the work performed by the Board of County Commissioners as herein set forth, to the extent of Eight Thousand Dollars (\$8,000.00) or to any extent whatever, and that the assessment sought to be collected from the plaintiff, as above set forth, is out of all proportion to the assessment sought to be collected from the agricultural lands situated north of the City of Sioux Falls. That the said equalization of benefits is so arbitrary and discriminatory against the property of the plaintiff as to deprive plaintiff of its property without due process of law and to deprive the plaintiff of the equal protection of the laws."

The plaintiff appearing by its solicitor, A. B. Fairbank, and defendants appearing by their solicitor, E. O. Jones, and the intervening defendants appearing by their attorneys, Porter & Bartlett, and the Court being fully advised in the premises, and it appearing to the court that upon the trial 126 of the said action evidence was offered and received by and from all parties to the said action relevant to the issues proposed to be raised by said amendment and that in the furtherance of justice the said amendment should be permitted;

Now Therefore, It Is Hereby Ordered: That the motion to amend the plaintiff's original bill of complaint be and the same is hereby allowed; and it is Further Ordered that the amendment be made and filed nunc pro tunc as of the date of the trial of the said action on the 15th day of December, 1921.

It Is Further Ordered: That the amendment be made by attaching to the original bill of complaint a copy of the amendment and making it a part of the original bill, and that the bill as amended need not be written in full; and it is Further Ordered: That the answers of the defendants and intervening defendants now on file in this action shall stand as answers to the bill as amended.

And the defendants and intervening defendants having asked permission to submit further evidence upon the issue set out in the amendment, It Is Further Ordered; That they may do so at any time within 10 days from the date hereof upon two days' notice to attorneys for plaintiff.

Done at Sioux Falls, South Dakota, this 31st day of January, 1922.

By the Court:
(Seal of Court)

JAS. D. ELLIOTT,
Judge of the District Court.

Attest:

Jerry Carleton,
Clerk of the District Court.

Endorsed: Filed in the District Court on Jan. 31, 1922, at
2 P. M.

129 (Exception of defendants to order allowing amendment
to bill of complaint.)

January 31, 1922.

Come now the defendants, by their attorney, E. O. Jones, Esq., and the Intervening Defendants, by their attorney, N. B. Bartlett, Esq., and except to the Order permitting the amendment to the Bill to conform to the proof, which exception is allowed by the Court.

Added to the bill of complaint by order of the court
dated the 31st day of January, 1922.

That the equalization of benefits of 839.45 units out of a total number of units of 32,549.62, estimated in dollars and cents at approximately Eight Thousand Dollars (\$8,000), fixed by the Board of County Commissioners of Minnehaha County, South Dakota, on the 10th day of June, 1921, against the property of the Chicago, Rock Island & Pacific Railway Company, as above set forth is wholly speculative, arbitrary, unjust, illegal and discriminatory and was made by the Board of County Commissioners without any reasonable or rational basis therefor, and is not in proportion to any benefit which the property of the plaintiff has received or even can receive by reason of the rebuilding of the spillway, the cleaning out, repairing and maintaining of Drainage Ditch No. 1 and Drainage Ditch No. 2, as set forth herein; that the property of the plaintiff has not and never can be benefited

by the work performed by the Board of County Commissioners as herein set forth, to the extent of Eight Thousand Dollars (\$8,000) or to any extent whatever, and that the assessment sought to be collected from the plaintiff, as above set forth is out of all proportion to the assessment sought to be collected from the agricultural lands situated north of the City of Sioux Falls. That the said equalization of benefits is so arbitrary and discriminatory against the property of the plaintiff as to deprive the plaintiff of its property without due process of law and to deprive the plaintiff of the equal protection of the laws.

(Endorsed)—Filed January 31, 1922, nunc pro tunc as of December 15, 1921.

JERRY CARLETON, Clerk.

133 (Opinion of the District Court.)

James D. Elliott, District Judge.

United States District Court, District of South Dakota.
Sioux Falls, S. Dak., Feb. 17th, 1922.

Chicago, Rock Island & Pacific Railway Company, a corporation, Plaintiff,

No. 98 S. D. vs. In Equity
A. G. Risty, et al., Defendants,
and

Minnehaha National Bank of Sioux Falls, S. D., Intervening,
Defendants.

Chicago, Milwaukee & St. Paul Railway Company, a corporation, Plaintiff,

No. 99 S. D. vs. In Equity
A. G. Risty, Et al., Defendants,
and

Minnehaha National Bank of Sioux Falls, S. D., et al., Intervening Defendants.

Chicago, St. Paul, Minneapolis & Omaha Railway Company,
a corporation, Plaintiff,

No. 100 S. D. vs. In Equity
A. G. Risty, et al., Defendants,
and

Minnehaha National Bank of Sioux Falls, S. D., et al., Intervening Defendants.

Northern States Power Company, a Corporation, Plaintiff,
No. 101 S. D. vs. In Equity
A. G. Risty, et al., Defendants,

and

Minnehaha National Bank of Sioux Falls, S. D., et al., Intervening Defendants.

134 City of Sioux Falls, a Municipal Corporation, Plaintiff,
No. 102 S. D. vs. In Equity
A. G. Risty, et al., Defendants

and

Minnehaha National Bank of Sioux Falls, S. D., et al., Intervening Defendants.

Great Northern Railway Company, a Corporation, Plaintiff,
No. 103 S. D. vs. In Equity
A. G. Risty, et al., Defendants,
and

Minnehaha National Bank of Sioux Falls, S. D., et al., Intervening Defendants.

C. O. Bailey, Esq., Sioux Falls, S. D. and others, Counsel for Plaintiffs.

Messrs. Porter & Bartlett, and C. O. Jones, Esq., Sioux Falls, S. D., Counsel for Defendants.

Gentlemen:—

I have finally disposed of the questions presented in the various drainage ditch cases, consolidated for the purpose of trial, and which were tried and submitted upon single record.

The question of the constitutionality of the South Dakota drainage statute is pleaded by each plaintiff, and upon this issue, the interests of the plaintiffs in all these suits are identical. It is urged by the plaintiffs in the various suits that the entire South Dakota drainage statute is unconstitutional for the reason that it is in conflict with the Fourteenth Amendment of the Constitution of the United States.
135 Plaintiffs call the Court's attention to the provision of the Fourteenth Amendment that prevents the taking of property "Without the due process of law."

If the South Dakota statute does not give the person whose land is to be assessed for the drainage of agricultural lands

his "day in court", then there is no "Due process of law." I find upon investigation of the various drainage ditch statutes that almost universally the provision is made for the organization at the inception of the proceeding of a drainage district, with boundaries defined organized after notice to all property owners within the district, and endowed by statute with certain powers consistent with the purpose for which the district is organized. I also note that ordinarily, where no provision is made for the formation of a drainage district, as is the case in this state, provisions are usually made for the notification of the property owners whose interests are supposed to be included in the drainage district, and for the giving to them of an opportunity to be heard in respect to the question of the practicability or feasibility of the drainage proposition, and whether or not the benefits will exceed the cost, and whether or not the particular lands of the owner, shall be included within the drainage district and assessed its pro-rata share of the benefits.

It is urged by the plaintiffs, and must be conceded, that in this regard the South Dakota statute differs from the drainage statutes of most other states. Section 8459, Revised Statutes of South Dakota, provides that a petition for proposed drainage may be filed with the Board of County Commissioners. This is the first step in the proceeding.

136 This petition is only required to set forth the necessity for the drainage, a description of the route, its initial and terminal points, and its general course, or of its exact course in whole or in part, and a general statement of the territory likely to be affected thereby.

Under this statute petitioners are not required to describe the specific tracts of land to be included within the drainage area, or which will be affected thereby or assessed therefor. Neither is it necessary to give the names of the owners of the property. The statute requires only a "general statement" as to the extent of the territory affected.

Section 8461 of said Revised Statutes, provides that the Board shall fix a time and place for the hearing of the petition and shall give notice by publication at least once each week for two consecutive weeks in a newspaper in the county, and by posting notices near the route of the proposed drainage. It also provides that such notice shall describe the route of the proposed drainage, and the tract of country likely to be affected thereby, in general terms, the separate tracts of

land through which the proposed drainage will pass, and give the names of the owners thereof as appears from the records in the office of the Register of Deeds on the date of the filing of the petition. It is further provided that such notice shall summon all persons affected by the proposed drainage to appear at such hearing and show cause why the proposed drainage should not be established and constructed.

✓ 137 Plaintiffs note that this statute, except as to property owners through whose property the proposed drainage will pass, provides only this general notice, and especially complain that it gives no property owner any notice that his particular tracts of land is included among the lands affected by the proposed drainage, and insist that the notice is broad enough to take in each and every tract of land included within the boundaries of the county in which the drainage project is situated.

It is true that, other than this general notice, there is no notice whatever given to the property owner that his particular land is affected by the drainage proposition, or that he has any interest in it, or will be mulated in assessment for benefits by reason thereof. He receives no summons or other notice, either by personal service or by mail. He has, however, the general notice given in the published summons by the Commissioners to "All persons affected by the proposed drainage to appear at such hearing and show cause why the proposed drainage should not be established and constructed."

By Section 8461 of the said Revised Statutes, the County commissioners pass upon the petition at the time named in the summons and notice, and if they find it feasible to establish the drainage, no provision is made for any other notice to any property owner, unless it should be found necessary to change the initial or terminal points so that the drainage will pass through other lands than those described in the original notice, or to increase the width of the lands to be taken for the proposed drainage, in which case the Board must give the owners of such lands notice. There is 138 no provision, however, for any notice to any property owner after the drainage ditch is established.

The Board may then proceed without further notice, to its construction. It may incur construction expense before taking any proceedings towards making an assessment for the payment of the costs, or it may before doing the work,

estimate the costs and make an apportionment of benefits upon which the assessment may subsequently be spread by the County Auditor.

Section 8463 of said Revised Statutes authorizes the said County Commissioners, after establishing the drainage to fix the proportion of benefits of the proposed drainage among the lands affected, and also appoint a time and place for equalizing the same. It is then provided that notice of such equalization of proportion of benefits shall be given by publication for two weeks. It is provided that this notice must give a description of each tract of land affected by the proposed drainage, and the names of the owners as appears from the records of the office of the Register of Deeds. It is further provided that the lands to be charged with benefits include all pieces of property that, in the judgment of the Board of County Commissioners are benefitted by the drainage proposition. At this hearing the Board fixes the proportion of benefits for each tract of land, taking any particular tract as a unit, and also fixes the benefit which any railroad company may obtain for its property by such construction and equals it together with the proportion of the benefits to tracts of land. This statute seems to provide for this hearing for fixing the proportion of the benefits before the ditch is constructed and before it is known what will be the actual amount of money expended. This hearing may be delayed until after the ditch has been built. It also provides that in event there is further expense incurred, or if for any reason, parties assessed do not pay the tax, a new proportion of benefits shall be fixed and new assessments made.

At this hearing the owners of the lands alleged to be benefitted have notice, have the right to appear and contest the amount of the benefits upon their lands, and may even urge that no benefits are derived. From this assessment there is a provision granting an appeal to the Circuit Court of the County in which the lands are situated, in which the proportional benefit may be an issue, and the owner of the land, upon such appeal, may contest the fact that there are any benefits to the land in question. The law further provides for an appeal from the determination of such issue in the Circuit Court to the Supreme Court of the State.

After such proportional benefits are determined the County Auditor spreads the tax and it then becomes a lien upon the property benefitted.

This brief statement of the provisions of the statute, not at all complete, but in a general way outlines the general powers of the Board and the method of the establishment of the ditch, and the various steps up to the spreading of the tax against the lands benefitted.

- 140 These proceedings are peculiarly limited to the drainage of agricultural lands, because the Constitution of the State of South Dakota provides that:

"The drainage of agricultural lands is especially declared to be a public purpose and the Legislature may provide therefor, and may provide for the organization of drainage districts for the drainage of lands for any public use, and may vest corporate authorities thereof and the corporate authorities of counties, townships and municipalities, with powers to constitute levees, drains and ditches * * * * by special assessments upon the property benefitted thereby according to the benefits received."

Pursuant to this provision of the Constitution, the Legislature of the State has provided for the drainage of agricultural lands, but nowhere is there any statutory enactment under which drainage districts may be formed for the drainage of lands "for any public use". Without repetition, and calling attention now to the reasons urged by the plaintiffs sustaining the unconstitutionality of this statute enacted for the purpose of draining agricultural lands, and considering the objections urged in various forms by the different plaintiffs, we find that all of the objections center about the criticism that no notice is provided the owners of lands affected by the drainage ditch, except the general notice, and in fact, no personal notice until the date fixed by the Board for the equalization of proportional assessments for the various tracts of land

- 141 benefitted by the drainage. It will be noted that the Legislature has provided that no tax can become effective, no assessment can be made, until the benefits have been ascertained and proportioned, and before this can be done a definite day must be named by the Board and the various land owners are given notice.

The question resolves itself into one of whether or not this hearing after notice, with the right of appeal, constitutes "a day in Court" to the various land owners. I have reviewed the authorities submitted by plaintiffs and I am frank to confess that the statutes of this state do not provide for the description of the lands alleged to be benefitted by the ditch, or the owners of the lands, or that notice shall be given to such

owners, or that the owners shall appear and show cause, if any they have, why the ditch is not practicable or should not be established, or have the opportunity to show that the cost would be greater than the benefits, or would be confiscatory, and yet, I am satisfied that the courts of the various states and the Supreme Court of the United States have recognized the power of the Legislature to provide the method of the levying of this tax against the lands benefitted by a drainage ditch, and have held that a law that provides for notice and an appearance and the right to contest the amount of the tax, and to contest the right to tax at all, with the right of appeal therefrom, if given to the land owner prior to the time that a tax is levied and becomes effective, is "due process of law."

142 I was impressed upon the oral argument with counsel's reference to the decision in the North Dakota case, Sophiah vs. Heskin, etc., 222 U. S. 522. Counsel urged that the law of North Dakota, very similar to ours, was sustained because it provided for a notice at the time of the establishment of the ditch. Reference to this opinion demonstrates that the Court held as follows:

"Neither does that Amendment invalidate an act authorizing an appointed Board to determine whether a proposed drain will be a public benefit and create a drainage district consisting of land which it decides will be benefitted by such drain, and to make special assessments accordingly, if, as here, notice is given and an opportunity to be heard afforded the land owner before the assessment becomes a lien against his property.

(Underscoring is mine.)

Under the South Dakota statute, applying this rule as announced in the North Dakota case, clearly, the notice is provided and an opportunity to be heard is afforded the land owner before the assessment becomes a lien upon his property, in the drainage of agricultural lands.

Louisiana has held that:

"Whenever by the rules of the state or by state authority, a tax assessment, servitude or other burden is imposed upon property for the public use, * * * * * and those laws provide for a mode of confirming or contesting the charge thus imposed in the ordinary courts of justice with such notice to the person of such proceedings in regard

to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without 'due process of law.' " Davidson vs. New Orleans, 96 U. S. 97.

Massachusetts has held that:

"If the legislature provides for notice to and hearing of each proprietor at some stage of the proceedings upon the question of what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law." Spencer vs. Merchant, 125 U. S. 578.

Construing the statutes of the State of Missouri, it was held that:

"It is granted that the land owners were not afforded an opportunity to be heard in respect to the value of their land. While no hearing is given when the lands are appraised a hearing is given when the tax is sought to be enforced. The mode of enforcement is by a suit in a court of justice when owners aggrieved by the valuation may have a full hearing upon that question. This is due process of law." Embree vs. K. C. & L. Road Dist. 240 U. S. 242.

The drainage statute of Michigan was considered in re Roberts vs. Smith, 72 N. W., and also in Gillette vs. McLaughlin, 37 N. W. 551, and in Smith vs. Carlo, 72 N. W.

22. In these cases the same objections were made to 144 the constitutionality of the law that are urged by the plaintiffs here, and especially that the persons who did not own lands traversed by the drain, but who are within the assessment district, have no opportunity to be heard upon the necessity for laying the drain. And, further, that persons within the assessment district are entitled, under the constitution, to a hearing upon the question of the public necessity for the drain. These contentions were denied in these cases, the law held constitutional, and a full discussion of the questions is to be found in these cases and the cases therein cited.

The Michigan statute is construed again in re Voight vs. Detroit, 82 N. W. 253, and on appeal, 184 U. S. 115, in which it was urged that no provision is made for a notice to property owners of the time and place of hearing upon either the question of fixing the taxing district or the amount of the award to be spread thereon. This, it is claimed, leads to taking property without due process of law, and therefore the law is unconstitutional. It was claimed in this case, by counsel, that the complainant was entitled to notice of the hear-

ing relating to the establishment of the assessment district, and of the amount of the total assessment, and because the statute did not provide for these notices it was unconstitutional. It was held in this case that this position could not be maintained.

"The provision of law by which, when the proceeding has reached the stage where it is proposed to levy the tax, a notice must be served on the property owner, was held sufficient to avoid the constitutional objection, notwithstanding no notice is required in respect to the creation of the district or the determination of the aggregate amount of the tax to be collected."

In re Paulson vs. Portland, 149 U. S. 30 it is held:

"It is settled that if provision is made for notice to and hearing of each proprietor at some stage of the proceedings upon the question, What proportion of tax shall be assessed upon his land, there is no taking of his property without due process of law."

I repeat that under the South Dakota statute there is ample provision for notice to every land owner, and an opportunity given to be present at the hearing, at which time and place he may assert all objections against the validity and justice of the proposed charge upon his property before the tax is levied, and carried by the County Auditor as such on the books of his office and made a lien upon the property. It follows that, in my judgment, the South Dakota [statutes], enacted in the light of that provision of the Constitution of the State providing for the drainage of agricultural lands, is constitutional.

The case made by the bills filed by the plaintiffs in these various actions involve a real and substantial question under the Constitution of the United States. The amount involved in each case is greatly in excess of Three Thousand Dollars, exclusive of interest and costs. On the question of the jurisdiction of this Court, I am of the opinion that each 146 plaintiff states a case in his bill plainly cognizable in this court. All of the plaintiffs except the City of Sioux Falls allege diversity of citizenship, in addition to the Constitutional question, and the proper amount involved. I repeat that there can be no question as to the bills involving a real and substantial question under the Constitution of the United States, and in such a case the jurisdiction of this Court extends to every question involved, whether of Federal or

State law, and enables the Court to rest its judgment or decree on the decision of such of the questions as in its opinion effectually dispose of the cases. Davis et al. vs. Wallace et al. (Opinion Jan. 9, 1922, . . . U. S. . . . with cases there cited)

It conclusively appears on the face of these pleadings that there is no speedy or adequate remedy at law. The remedy at law must be a remedy on the law side of the Federal Court, not a remedy in the State Courts of South Dakota. In each of the cases where there is a diversity of citizenship, this Court of Equity will not deny the plaintiff relief because there may be a remedy in the courts of the state, for the reason that the non-resident is not required to subject himself to jurisdiction of the Courts of the State in order to obtain relief. U. S. Life Ins. Co. vs. Cable, 95 Fed. 761.

In neither of the cases at bar is there a remedy at law on the law side of the Federal Court. If plaintiffs, or either of them are compelled to pay this tax, no action would lie on the law side of the Court that would give them relief.

147 No action on the law side of the Court would protect them, or either of them, from future assessments and future responsibilities.

There is the further issue presented on the face of the bills, that for the reasons therein stated, no Drainage Ditch No. 1 and 2, under which it is pretended this assessment is made, was ever established. That this is simply a pretense for the maintenance and repair of the ditches that had been theretofore established, and that the steps that have been taken by the County Commissioners are without authority of law. In substance, that the Board of County Commissioners are trespassers, acting with no right or color of right. That insofar as there is an attempt to assess benefits to the property of the plaintiffs, or other property in the City of Sioux Falls, the proceedings are entirely void. That as to each of the plaintiffs the assessment of benefits made is arbitrary, unjust, illegal and void. This is the basis of the claim that the assessment is such as to result in the property of the plaintiffs bearing more than its share of the burden of improvements while such property is in no wise benefitted thereby. That the alleged benefits from this improvement have not been estimated upon these properties with the farm lands according to any standard which will produce approximately correct general results. That the taxes upon the plaintiff's property are upon

some fanciful view of future benefits, while the farm
148 property is assessed wholly according to its area and position. That the property of the respective plaintiffs is sought to be burdened for this improvement upon a basis so wholly different from that used for ascertaining the contribution demanded from individual owners of agricultural lands adjacent to the drain, as necessarily to produce manifest inequality. That the plaintiffs are therefore deprived of the protection of the law which must be extended to all.

The determination of these various issues necessarily requires a consideration of the facts as they appear in the record. Fortunately there is practically no dispute as to the facts. The only dispute is as to the legal effect of the acts of the Board of County Commissioners.

What, then, was the situation at and prior to the time that the said Board assumed authority to require the plaintiffs and others in the City of Sioux Falls, to pay for the building of this new spillway, and the repair of the ditches hereinafter referred to? The Sioux River flows from the north, in a southerly direction, west of the City of Sioux Falls, then flows in an easterly direction, south of the main portion of the city, then flows north through the city of Sioux Falls, flowing a distance of some ten miles from a point north of the city where the drainage ditch hereinafter referred to leaves the river, to a point where the drainage ditch empties its waters into the river. The river thus describes a large [horse-show], the drainage ditch cutting across the open end, practicably from the river on one side to the river on the
149 other. Dell Rapids is situated in the Sioux Valley more than twenty miles north of Sioux Falls.

At first there was established Drainage Ditch No. 1, and then Drainage Ditch No. 2. These two ditches extended from a point north of the City of Sioux Falls some distance to a point some fifteen miles north of Sioux Falls, at which point Drainage Ditch No. 2 was intended to take the flood water from the Sioux River and conduct it down its length into and through Drainage Ditch No. 1, to the river north of Sioux Falls, cutting through the hills adjacent to the river, and necessitating the conduct of the water down a fall of more than one hundred feet into the river. Drainage Ditch No. 1 and Drainage Ditch No. 2 were duly constructed under the provisions of the Constitution and laws of the state for the drainage of agricultural lands and were operated

for the purpose for which they were constructed. The first petition for said Drainage Ditch No. 1 was filed in 1907, and the petition for Drainage Ditch No. 2 was filed in 1910. Such proceedings were had that these two ditches were constructed down the valley in a southerly direction, near the Sioux River until a point was reached north of the City of Sioux Falls, when the ditch was turned in an easterly direction across to the Sioux River at a point north and east of the City of Sioux Falls. Benefits were assessed and paid by the owners of adjacent lands under the provisions of the statutes of

the State of South Dakota to which I have referred. In
150 1915 the force of the waters conducted by these two drainage ditches was so great as to wash out what is called the spillway, through the bluff adjacent to the point where the waters from the ditches entered the river. The ditches in the meantime also became out of repair, and at one point several miles above the City where the ditch approached the river, the water was cutting from the river into the ditch, threatening to turn the entire course of the Sioux River at this point into the ditch, and through the ditch back into the river, leaving the Sioux River from that point and for about twelve miles around to where the ditch flowed into the river, without water. The spillway from the ditch through the bluff down into the river was so unskillfully, inefficiently and unscientifically constructed that it would not stand the force of the water with a fall of one hundred feet into the river. It was washed out, and the bluff being of soil and sand, washed out of the entire depth of the river and began washing back through the bluffs, threatening to cut clear back to a point where the water cut through from the river to the ditch, thus taking away from the City of Sioux Falls the benefits of the river, its sewer system and the advantages of the stream, and take the water from the plaintiff, The Northern States Power Company, that naturally flowed down the river except for the interference by this drainage ditch. And in the cutting into this bluff also threatened to cut into the gravel bed in which the water supply of the City is located, a few miles west of it, and thus drain and destroy and take away from the City of Sioux Falls, its water supply. This was

the situation in 1916. This situation presented no question of the drainage of agricultural lands. The people who had been responsible for the establishment of these two drainage ditches and the conduct of the water down through the hills to the river below, because of the inefficient manner in which the spillway had been constructed, had caused all of the trouble. The thing that confronted the Board

of County Commissioners at that time, having charge of these two drainage districts, was the maintenance of the ditches and of the spillway which was a part of the ditch that had already been constructed. In the construction of these ditches no suggestion had ever been made that the City of Sioux Falls, all lying entirely south of the districts drained, was in any manner interested in the drainage, or that there could be any benefits assessed to such city or any property owner thereof. The situation that confronted them was not drainage of agricultural lands, it was the maintenance of the ditches that had been established by them, and the prevention of the dangers threatened by the water that they were conducting down through these ditches, through this hill, into the river. They might have taken their chances upon damages that their acts were responsible for, and let the river cut down through the ditch that they had constructed and turned the course of the river there and taken the water away from the City of Sioux Falls entirely, and exhausted and destroyed the City's water supply, and destroyed the power of the plaintiff, the Northern States Power Company, by taking the water from the stream at the point where the power plant is located, without in any way endangering the agricultural lands

along this ditch, except so much of it as would be 152 washed away in forming this new bed of the river. I

I apprehended that we may reasonably find from the evidence here that such a cut-off in the river would be to the advantage of the land owners and prevent floods, so that it was not the drainage of the lands that was bothering the Commissioners, it was not the purpose to drain agricultural lands that impelled the Commissioners to act; the thing that impelled them to give this situation any consideration was the dangers that were threatened by reason of their having constructed these two ditches, and an effort to stop the ravages of the water they were conducting down there, by the construction of a substantial, adequate spillway. It was also necessary for them, in order to stop this threatened danger, to stop the ravages of the water at the point where it was cutting into their ditch. Certainly, this condition never could have existed if they had never built the ditch. They were responsible for it and it was their duty to maintain the ditch and to stop the ravages of the water cutting into it and through it.

This was one of the questions that they had before them, one of the problems that they had to solve, and they did proceed to construct this spillway in a substantial way and to dike and with cement to hold the water in the stream at the

place where it was cutting into the ditch. The statutes of the State of South Dakota specifically provide the duty and the method for the maintenance of these ditches. Section 8470 of the said Revised Statutes, provides as follows:

153 "Assessments for maintenance. For the cleaning and maintenance of any drainage ditch established under the provisions of this article, assessments may be made upon the land owners affected, in the proportion determined for such drainage, at any time, upon the petition of any person setting forth the necessity therefor, and after due inspection by the Board of County Commissioners."

When this river cut through into the ditch, when the ditches became clogged in places and was not wide enough in others, when the spillway washed out by the force of the water they were conducting down the ditch, and the cutting of the bluff began and large areas of land were being washed away, and the other dangers were threatened, there was only one proposition presented to the Commissioners, and that was one of maintenance; was one of taking care of the water that they were conducting down these two ditches, No. 1 and No. 2.

Instead of proceeding frankly to maintain the ditches they had established in the manner provided by statute; instead of carrying out the obligations they had assumed when they brought the water down through these ditches, and attempted to deliver it through this bluff into the river; instead of proceeding regularly under this statute to do that which it was their duty to do; instead of performing the obligation that they had assumed when they established the ditches, that of maintaining them, they proceeded to act upon the assumption that because they had conducted the water down into these ditches, and because of the inefficient manner in which 154 they had constructed the ditches and built the spillway, and all of these dangers were threatened, therefore, the plaintiffs, and others in Sioux Falls, were necessarily to be damaged. And, although a proper maintenance of these two ditches, No. 1 and No. 2, would stop the damage, would prevent the danger, the Commissioners evidently reasoned that because the plaintiffs and others in Sioux Falls were in danger, they must pay for the repair of these ditches. That could not be done by simply saying the ditches shall be repaired and the City of Sioux Falls, the plaintiffs, and others, shall pay for it, or pay a part of it, and therefore, they proceeded to do indirectly what it was conceded they could not do directly. In other words, they then began to

look around and see what they would do in the way of taking care of the water and stopping these dangers.

A first it was proposed to change the spillway and conduct the water down a southerly direction, through a slough or lake, into the river west of the City, and save the great fall that is involved at the point where the water enters the river from the spillway northeast of the city. This was abandoned and they finally then pretended to act under a statute authorizing the abandonment of ditches. As a matter of fact there was no abandonment in good faith. No attempt to abandon the ditches. In fact, the reading of the resolution shows it was simply that they abandoned the spillway. That they filed a petition which was headed, "To reconstruct and improve Drainage Ditches No. 1 and No. 2, Minnehaha County, South Dakota, and to construct a new spillway or outlet to said Drainage Ditches No. 1 and No. 2, and to pay 155 therefor by assessment upon the property, persons and corporations benefitted thereby."

This petition was filed in July, 1916, with the Board of County Commissioners. There had never been an abandonment of Ditch No. 1 and Ditch No. 2. There had been a pretended abandonment of the spillway. But the Commissioners proceeded then to construct a proper spillway on the identical location of the old one. In other words, no change whatever was made in the two ditches, No. 1 and No. 2, except to properly construct an efficient, adequate, substantial spillway, and prevent the river cutting from its bed into the ditch, cleaning out the ditch and repairing it, changing the gates at the head of the ditch where the flood waters were taken from the river.

Upon this petition, for this purpose, the Board of Commissioners assumed authority and power to rechristen this Ditch No. and Ditch No. 2, and call it Ditch No. 1 and 2, and for the purpose of making these repairs and maintaining the old ditches under the new name, proceeded as if no ditch had been established, and as if the Ditches No. 1 and No. 2 were not in existence, and as if no obligation had been assumed by the drainage districts when they diverted the water down the bluffs to the river, and proceeded to make the repairs and to reach out and say that the various plaintiffs were benefitted. Instead of charging the repairs and maintenance of the ditches to those who were responsible for their construction under the provisions of the statutes above

referred to, the Commissioners proceeded to assume
156 the right and authority to constitute a new drainage
ditch without the abandonment of the old ditches, with
no thought of using new or different drainage in any way,
except to maintain them and to perfect that which had been
inefficiently constructed, with no thought or purpose except
to repair the damage that had already been done, and prevent future damage.

Under these circumstances, I am of the opinion that the Commissioners were acting entirely without authority of law. There is no provision in the statutes of the State of South Dakota for the taking in of any other lands and assessing them, for the maintaining of a ditch after it has been constructed, and the benefits of its building have been assessed.

I am of the opinion that the forming of this new ditch was simply a pretense, and that the plaintiffs' pleading that it was a subterfuge is supported by the proof, resorted to for the sole purpose of attempting to burden the plaintiffs and others with the cost of the maintenance of the ditches theretofore constructed.

I am of the opinion that Section 8489 of said Revised Statutes, in regard to invalid and abandoned proceedings is not applicable to any situation such as exist here. That section provides for the re-establishment of a ditch over the same territory, and that the new ditch shall assume the expenses paid has reference to the abandonment of a ditch that has been enjoined, vacated, set aside or declared void, and specifically on the old ditch, and give credit for any payment made upon the old ditch by the people benefitted. No such proceeding was attempted to be followed in this case.

157 The proceedings establishing old ditches No. 1 and No. 2, have never been held void, never been set aside, never been abandoned. They are in force today and are responsible for the manner in which the ditches were constructed and for any damages that result from their negligence.

Under these circumstances the Board of County Commissioners had absolutely no authority, no right or color of right, were not acting under the provision of any statute of the State when they assumed the right to reach out and attempt to assess the benefits for the repair and maintainence of said ditches against the property of the various plaintiffs. They were mere trespassers, for the reason that no drainage Ditch No. 1 and 2 was ever established and has no existence.

I am of opinion that the proceedings of the Board of Commissioners in the repair and maintainence of these ditches, No. 1 and No. 2, by assuming the right to constitute a new drainage district, calling it District No. 1 and 2, and to assess benefits to the property of the plaintiffs, insofar as they are located in the City of Sioux Falls, are void. Entertaining this view it follows that plaintiffs' prayer for an injunction should be granted.

I may suggest in conclusion, however, that even if the Court had found that Drainage District No. 1 and 2, was legally constituted, and that the Board of County Commissioners had the right to extend the benefits to property within the City of Sioux Falls, the proofs overwhelmingly bring the plaintiffs within the rule recently expressed in *re Thomas et al. v. Kansas City Southern Railway Co., et al.* (De-

158 cember term A. D. 1921, . . . Fed. . . .) in that the taxation that is imposed upon each of the plaintiffs is a much higher rate, and upon a different basis, than the tax upon land lying within the district. As a matter of fact no direct benefits to the property of the railways within the city are shown. It is further shown that the benefits estimated upon the plaintiffs' property were upon no standard that would probably produce results approximately the same as those upon the land in the drainage district. Taking, for instance, the tax upon one of the plaintiffs, the City of Sioux Falls, for its miles of streets in the City of Sioux Falls, with no pretense that there is any method of taxation or measuring a benefit or a gain, that would produce even approximately correct general results, when considered with benefits to the lands in the district. Simply a vague, indefinite generality, indulged in by the engineer and adopted by the Board. Benefits purely fanciful, with no substantial basis. Take the railroads, different plaintiffs, there is no pretense that the basis used had any relation to that used in fixing the value upon the lands in the district. It is admitted that the basis was wholly different from that used for ascertaining the contribution demanded of individual owners, and I find that such difference necessarily produces manifest inequality. There is an entire absence of the equal protection of the law that must be extended to all.

Referring to the testimony showing the manner of making assessments and the amount, in a general way: I think it fair-

ly appears from the record in the case that the contention of the plaintiffs that the attempt to assess the property of these plaintiffs was an afterthought. It, 159 in my judgment, is established that they could not be benefitted, even admitting that this was a genuine drainage ditch for the purpose of draining agricultural lands, under the circumstances outlined in the evidence, there is no reasonable ground upon which the action of the Board could be predicated. There is no pretense in this record that the railroad companies were treated like owners of agricultural lands. The discrimination is palpable, and the amount assessed simply an arbitrary assessment. These plaintiffs were not attempted to be assessed in any manner contemplated by the statute, for the payment of the costs of draining agricultural lands. The plaintiff, Chicago, Rock Island & Pacific Railway Company, is simply arbitrarily assessed Eight Thousand Dollars, in raising a total of Three Hundred Thousand Dollars. The Northern States Power Company was assessed Fifty Thousand Dollars, one fifth of the entire expense although there is included in the pretended district agricultural lands something like twenty miles in length and several miles in width. The injustice of this is apparent when it is noted that the record disclosed that it was located upon the rapids of the Sioux River, in the City of Sioux Falls, had been located there for many years. It was, therefore, entitled to the water that naturally flowed down the stream to the end that it might secure power requisite for the conduct of its business.

The injury that was to be remedied by this improvement was one that had been caused by Drainage Ditch No. 1 and 160 Drainage Ditch No. 2, one that could not have existed but for the establishment of those ditches. The duty to maintain these ditches involved the duty to repair the break from the banks of the river, and the duty to prevent the taking of the water from the river, that would, or should, naturally flow therein to plaintiff's benefit.

Even if there had been a valid establishment of a drainage ditch at the time and place in controversy, and even if the Board of County Commissioners had jurisdiction, there was an entire failure to present any evidence upon which any benefit could possibly be predicated against this plaintiff. The engineer who pretended to work out the hypothetical benefit admitted that he was not a hydro-electric engineer, and therefore, not able to analyze and state the result of the different conditions of the water in the river. The suggestion ap-

plies with special force to the status of this plaintiff that the amount of benefits were fanciful, exorbitant and arbitrary, with no possible appreciation in the value of its property as a result of this improvement, and it is self-evident that upon no basis that can be used and applied to all of the property tributary to this ditch, could Thirty Thousand Dollars be ascertained as the reasonable contribution to be demanded of this particular plaintiff.

These suggestions are applicable in a general way to the attempted assessment of the property of all of the plaintiffs, and I am of the opinion that the plaintiffs have all properly invoked the aid of this Court from an arbitrary, unwar-
161 ranted exercise of power by the Board of County Commissioners of Minnehaha County, who, without due process of law or compensation, threatened to deprive them, and each of them, of their property. What I have said, I think, should apply with equal force to all property in the City of Sioux Falls attempted to be assessed by the Board of Commissioners for the maintenance of this ditch under the name of a new ditch. The responsibility for the maintenance of this ditch, for the repair of the break from the river into the ditch, and the change of the head gates, and the cleaning out of the ditch, and the repair and reconstruction of the spillway, was, and is, upon the two drainage districts responsible for their construction and maintenance, and the amount expended, some \$250,000.00, which, with interest, now amounts to \$300,000.00 or more, is a charge upon those districts to be assessed and made a lien upon the property within the districts, assessed in the proportion and collected in the manner, provided by the statutes of the State of South Dakota for the maintenance of drainage ditches.

There is another and further suggestion. I am of the opinion that this reconstruction of the old spillway with-out change of location, the repair of the break from the river into the ditch, the cleaning of the ditch, the change of the head gates where the flood waters are taken from the river, everything that was done under this pretended establishment of a new ditch, could not be viewed in the same light or as serving
162 the same purpose as the construction of the original ditches, because the thing that caused the Board of Commissioners to take any action with reference to the condition that then existed was the danger that existed because of the conduct of the water down

down through these two drainage ditches to and through this spillway. The danger that was threatened was not that the agricultural lands would not be drained, but that immense damage was threatened, that the course of the river was to be diverted to this cut-off, that great areas of land were threatened to be cut away by this river one hundred feet deep, that the water supply of the City was threatened to be taken away because of this drainage ditch and this imperfect spillway. Because the water was to be taken from the river and all of the benefits of the river for several miles, through and around the City of Sioux Falls would be destroyed. The power of the Northern States Power Company would be destroyed by taking the water from the river. If it had not been for those conditions, for these threatened dangers, no action would have been taken, the ditches would have continued to function as they had functioned before. If the spillway had been properly constructed originally, and if it had not proven inadequate, there would have been no cause for any action by the Board in the year 1916. Every consideration that impelled action by the Board was some phase of the threatened danger by reason of the inadequate and imperfect construction and [maintenance] of these two ditches. Neither of these considerations that influenced the action of the Board had anything to do with draining agricultural lands.

163 It may be said that to remedy these wrongs constituted a public use, as referred to in the Constitution of the State of South Dakota. Admitting that that is true, we are confronted with the proposition that there has been no legislation conforming with the provisions of the Constitution, authorizing the Legislature to provide for the establishment of drainage ditch districts, and the naming of officers with the powers therein referred to. If, therefore, any claim were made that the Commissioners were acting under this authority, independent of the provision of law with reference to the drainage of agricultural lands, the answer is that the provision of the Constitution is not self-executing, and that no legislation has been provided carrying this provision of the Constitution into effect.

You may prepare proper orders in each case granting plaintiff an injunction as to all property located in the city of Sioux Falls and all Property not within the old Drainage District No. 1 and Drainage District No. 2. Provide an exception in behalf of the plaintiffs to the order of the Court denying the plea of the unconstitutionality of the drainage statute as

applied to agricultural lands and the defendants a general exception to each order.

Yours truly,

JAS. D. ELLIOTT
U. S. District Judge.

Endorsed: Filed in the District Court on Feb. 1922, at
4:15 P. M.

165 (Decree, February 28, 1922.)

In the District Court of the United States, for the District of South Dakota, Southern Division.

Chicago, Rock Island and Pacific Railway Company, a corporation, Plaintiff,

vs.

A. G. Risty, J. A. Jensen, C. W. Knott, Chris Olson, G. W. Tyler, and C. T. Charnock, as County Commissioners of Minnehaha County, South Dakota, Fred E. Ward, as Auditor of Minnehaha County, South Dakota, and J. O. Anderson, as Treasurer of Minnehaha County, South Dakota, Defendants,

Minnehaha National Bank of Sioux Falls, South Dakota, Sioux Falls National Bank of Sioux Falls, South Dakota, Security National Bank of Sioux Falls, South Dakota, First National Bank of Dell Rapids, South Dakota, First National Bank of Garretson, South Dakota, Savings Bank of Colton, South Dakota, Brandon Savings Bank of Brandon, South Dakota, Minnehaha County Bank of Valley Springs, South Dakota, The Rowena State Bank of Rowena, South Dakota, Farmers Bank of Humboldt, South Dakota, Dakota Trust & Savings Bank of Sioux Falls, South Dakota, Commercial and Savings Bank of Sioux Falls, South Dakota, Minnehaha State Bank of Garretson, South Dakota, Sioux Falls Savings Bank of Sioux Falls, South Dakota, Sioux Falls Savings Bank of Sioux Falls, South Dakota, H. E. Donahoe and W. G. Porter Intervening Defendants.

This cause came on to be heard on the 15th day of December, 1921, at Sioux Falls, South Dakota, by agreement of counsel. The evidence of plaintiff and defendants and intervening defendants was introduced and argument of counsel heard, and thereupon upon consideration thereof;

It Is Hereby Ordered, Adjudged And Decreed that the defendants A. G. Risty, J. A. Jensen, C. W. Knodt, Chris Olson, G. W. Tyler and C. T. Charnock, as County Commissioners of the County of Minnehaha and State of South Dakota, and each of them, their agents, servants, employees, attorneys and successors in office be, and they are forever restrained and enjoined from making any apportionment of benefits

**upon the property of the plaintiff Chicago, Rock Island
166 and Pacific Railway Company hereinafter described for
the construction of the spillway, dams, retaining gates,
ditches, and for all other work done or hereafter to be done,
under the supervision of the Board of County Commis-
sioners of Minnehaha County, South Dakota, in the matter of the
construction or re-construction, repair and maintenance of
Drainage Ditch No. 1 and Drainage Ditch No. 2, otherwise
designated by said County Commissioners as Drainage Ditch
No. 1 and 2, of Minnehaha County, South Dakota, and they
and each of them are hereby perpetually restrained and en-
joined from making and levying any assessment upon the
property of the plaintiff, hereinafter described for the cost
and construction and maintenance of the said spillway, dams,
retaining gates, ditches and other work heretofore done, or
which may be [hereinafter] done upon the said drainage
ditches above set forth, or any of them, and from in any man-
ner including any of the property of the Chicago, Rock Island
and Pacific Railway Company, hereinafter described within
the territory benefitted by said drainage ditches, or any of
them.**

**And the defendant, Fred E. Ward, as Auditor of the County of Minnehaha and State of South Dakota, his agents, ser-
vants, employees, attorneys and successors in office are here-
by forever restrained and enjoined from making any appor-
tionment of benefits upon the property of the Chicago, Rock
Island and Pacific Railwy Company hereinafter described
for any work done or performed in the construction or main-
tenance of said drainage ditches, or any work which may be
done thereafter upon said drainage ditches or any of them
and from certifying any assessment therefor to the County
Treasurer of the County of Minnehaha and State of South
Dakota,**

**And the defendant, J. O. Anderson, as Treasurer of Minne-
haha County, South Dakota, his agents, servants, employees,
attorneys and successors in office are hereby forever enjoined
167 and restrained from filing any assessment and from
collecting any assessment against any of the property
of the Chicago, Rock Island and Pacific Railway Com-**

pany hereinafter described, for the construction, repair or maintenance of the drainage ditches above described, or any of them, for work which has already been performed upon the same or which may be hereafter performed thereon.

The property of the Chicago, Rock Island and Pacific Railway Company covered by the foregoing injunction is situated in Minnehaha County, South Dakota, and described as follows, to-wit:

Station grounds in the Northeast Quarter (NE $\frac{1}{4}$) of the Southwest Quarter (SW $\frac{1}{4}$) of Section Sixteen (16), Township One Hundred One (101) North, of Range Forty-nine (49), West of the Fifth Principal Meridian, between 6th and 8th Streets, and east of the Illinois Central station grounds in the City of Sioux Falls.

Tracts One (1) and Two (2) of the Southwest Quarter (SW $\frac{1}{4}$) of Section Sixteen (16), Township One Hundred One (101) North of Range Forty-nine (49), West of the Fifth Principal Meridian.

Lots A and B of Tract Seventeen (17) of the Southwest Quarter (SW $\frac{1}{4}$) of Section Sixteen (16), Township One Hundred One (101) North, of Range Forty-nine (49).

Tract Twenty-nine (29) of the Southwest Quarter (SW $\frac{1}{4}$) of Section Sixteen (16), Township One Hundred One (101), Range Forty-nine (49).

The west forty-four (44) feet of Lots Seven (7), Eight (8) and Nine (9), in Block Twenty-six (26) of J. L. Phillips Sioux Falls, in Section Sixteen (16), Township One Hundred One (101), Range Forty-nine (49).

All of the right of way tracks, embankments and bridges across Sections Sixteen (16), Twenty-one (21) and Twenty-two (22), in Township One Hundred One (101), north of Range Forty-nine (49), West of the Fifth Principal Meridian.

168 And the plaintiff, the Chicago, Rock Island and Pacific Railway Company is hereby given judgment against the defendants and each of them, and against the intervening defendants and each of them named herein for its costs and disbursements herein, to be taxed by the Clerk of this Court and inserted herein at \$.....

Done this 28 day of February, 1922.

By the Court:

(Seal of Court)

JAS. D. ELLIOTT,
Judge.

Attest:

Jerry Carleton, Clerk.

The defendants and intervening defendants except to the foregoing order and exception is allowed.

JAS. D. ELLIOTT
Judge of the District Court.

Endorsed: Filed in the District Court on Feb. 28, 1922,
at 3 P. M.

170

(Assignments of Errors.)

And now, on this 25th day of August, A. D. 1922, come the defendants, by their Solicitor, Elbert O. Jones and L. E. Wagoner, and the intervening defendants, by their Solieitor, Norman B. Bartlett, and say that the decree entered in the above entitled cause on the 28th day of February, A. D. 1922, is erroneous and [unust] to the defendants.

First:

Because plaintiff's bill of complaint herein does not set forth any matter of equity entitling the plaintiff to the relief prayed for, and it affirmatively appears, from said 171 bill of complaint that the plaintiff has a plain, adequate and complete remedy at law.

Second:

Because the bill of complaint does not set forth any matters of equity in addition to the pretended constitutional question, or any special circumstances to bring the case under some recognized head of equity jurisdiction, and it is necessary to allege and prove some special circumstances in addition to the constitutional question, and thereby bring the case under some recognized head of equity jurisdiction, in order that this Court shall have jurisdiction of said matters.

Third:

Because the bill of complaint fails to set forth facts sufficient from which this Court can infer or presume that there will result a multiplicity of suits, irreparable injury, or a cloud [case] upon the title of its property, and it is necessary to specifically allege facts from which this Court can infer that either a multiplicity of suits, irreparable injury or a cloud will be cast upon the title of its property as a direct result of the action that plaintiff is attempting to enjoin, and

such allegations must be specific allegations of fact, and not conclusions.

Fourth:

Because it affirmatively appears from the face of plaintiff's bill of complaint, and the record herein, that there is no jurisdictional amount in controversy in this case at this time, and can be none, and that, therefore, this action is prematurely brought, for the reason that no assessment, levy or tax has been, in fact, made, assessed, equalized, fixed or levied against the property of the plaintiff, or at all.

Fifth:

175 Because it affirmatively appears from plaintiff's bill of complaint, and the record herein, that the State Tribunal having jurisdiction of said drainage ditch proceedings, was enjoined by this proceeding before such Tribunal had had an opportunity to perform its statutory duty to determine, equalize, assess, fix or levy the amount of benefit, assessment or tax, if any, chargeable against the property of the plaintiff, and for this Court to maintain jurisdiction before such State Tribunal had performed its full statutory duty, determined, equalized, assessed and fixed the amount of benefit, assessment or tax, was a usurpation of the authority invested in the State Tribunal, and an attempt to substitute this Court for such State Tribunal; and for the further reason that there is no provision of law giving this Court original jurisdiction over said matters.

Sixth:

Because the allegations of plaintiff's bill of complaint herein involve and present for litigation the determination of facts and matters controlled and governed by the drainage statutes of South Dakota, which, by their terms, create and provide a special tribunal with exclusive original jurisdiction to try and determine the questions presented in said bill of complaint, which determinations of said State Tribunal are final and conclusive upon this Court in this action, for the reason that this Court has no original jurisdiction by a bill in equity, to direct, reject, or control the proceedings and determinations of that tribunal, and thereby take away from that tribunal the power of discretion, and the exercise of its judgment in arriving at a proper determination of the matters before it.

Seventh:

Because until the tribunal created by the drainage statutes of South Dakota has exercised its judgment and discretion in

173 the determination of questions of fact properly before it, and the necessary steps of procedure have been taken, and it has finally determined, equalized and fixed the proposed tax or assessment, if any, against the plaintiff's property, this Court has no jurisdiction over the subject matter set forth in plaintiff's bill of complaint, for the reason that until such proposed assessment, tax or servitude has been equalized and fixed and assessed, this action is premature.

Eighth:

Because the undisputed evidence shows that on or about December 4, 1920, an equity suit was instituted in the State Circuit Court, within and for Minnehaha County, South Dakota, the same being a court of general jurisdiction and having jurisdiction over the subject matter therein presented, by one Oluf O. Gilseth, being a person belonging to the same class of persons as the plaintiff herein, whose lands were affected by the construction of Drainage Ditch No. 1 and 2, and against whose lands the proportion of benefits for the construction of said ditch had been proportioned at the same time, upon the same basis, and in like manner and under the same law as the proportion of benefits to the land of this plaintiff, which said action was brought by said Oluf O. Gilseth for himself, and as a representative of the class to which he and this plaintiff belong, and which action was brought against the defendants herein, and was instituted, tried and determined with notice to and knowledge by, approval, acquiescence and consent of this plaintiff, its officers, agents and attorneys, and in which said case the same facts were alleged and relied upon in the bill of complaint of the said Oluf O. Gilseth as are alleged and relied upon by the plaintiff herein in its bill of complaint, and which bill of complaint prayed for the same relief, and which said action came on for

174 trial, in which trial this plaintiff was entitled to be heard, on the 31st day of January, 1921, and thereafter said State Court entered its judgment and decree dismissing said action upon its merits, and denying the plaintiff the right to an injunction against these defendants, which said judgment and decree is now in full force and effect, and which determination is binding upon this plaintiff, and is, therefore, a bar to this action, for the reason that all matters presented by plaintiff's bill of complaint herein are res adjudicata.

Ninth:

Because the uncontradicted evidence in this case shows that the petition of the City of Sioux Falls, F. L. Blackman and

others, filed August 3, 1916, and upon which the drainage ditch designated as Drainage Ditch No. 1 and 2, was ordered established and constructed, and the notice of the hearing said petition given pursuant to law, and the resolution of the Board upon the hearing of said petition establishing said ditch, all contained a description of plaintiff's property, and alleged that the same was affected thereby, and said resolution determined that plaintiff's property so described was affected by said Drainage Ditch No. 1 and 2, which determination, unappealed from, is now final and conclusive upon this plaintiff, and this Court, and, therefore, this Court was unwarranted in determining and decreeing that plaintiff's property is not affected by Drainage Ditch No. 1 and 2, no extrinsic fraud being alleged in plaintiff's bill of complaint.

Tenth:

Because the undisputed evidence in this case shows that the plaintiff's property is receiving some benefit, and that it has not exhausted its statutory remedy for an equalization of such benefits, and its only complaint is that too many units of benefit have been apportioned against its property; and, therefore, this Court has no jurisdiction under its general equity powers to correct an unequal or unjust assessment, since the statute prescribes a method for reviewing or correcting unequal or unjust assessments.

Eleventh:

Because under the undisputed evidence in this case, the resolution of the Board of County Commissioners of Minnehaha County, South Dakota, dated October 3, 1916, duly and legally established the said drainage ditch, and therein designated it as "Drainage Ditch No. 1 and 2", and found and determined therein and thereby that said ditch was a new project, with plaintiff's property included therein, which finding and judgment of said Tribunal are binding upon this plaintiff and upon this Court, and can not be attacked in this collateral action, for the reason that said Tribunal is, by the drainage law of the State of South Dakota, given jurisdiction to determine the nature, kind and character of the proposed drainage, and the description of and the amount of property affected by said drainage project, and having made said findings and judgment, and this plaintiff not having appealed therefrom, said plaintiff is now bound thereby.

Twelfth:

Because under the undisputed evidence in this case, the resolution of the Board of County Commissioners of Minne-

haha County, South Dakota, dated October 3, 1916, duly and legally established the said drainage ditch, and therein designated it as "Drainage Ditch No. 1 and 2", and found and determined therein and thereby that said ditch was conducive to the public health, convenience and welfare of the territory described in the petition of the City of Sioux Falls, F. L. Blackman and others, and was necessary and practicable for draining agricultural lands, which findings and judgment of

said Tribunal are now binding upon this plaintiff and
176 upon this Court, and cannot be attacked in this collateral action, for the reason that, by the drainage law of the State of South Dakota, the Board of County Commissioners are given authority to determine whether or not a proposed drainage ditch will or will not be conducive to the public health, convenience and welfare of the territory described in the petition therefor, or necessary and practicable for draining agricultural lands; and having found in the affirmative in both instances, and the plaintiff herein not having appealed from such determination, the same is now binding upon this plaintiff and upon this Court.

Thirteenth:

Because no facts have been alleged in plaintiff's bill of complaint constituting extrinsic fraud on the part of the Board of County Commissioners of Minnehaha County, South Dakota, or any one else, in filing the petition of the City of Sioux Falls, F. L. Blackman and others, or in the allegations contained therein, or the resolution or other proceedings on, and prior to, or in the establishment of said drainage ditch designated as "Drainage Ditch No. 1 and 2", on October 3, 1916; and there is no evidence in the record of any extrinsic fraud on behalf of the Board of County Commissioners, or anyone else, in any of said proceedings, and, therefore, the determination of the facts found by said Board in said resolution of October 3, 1916, are now binding and conclusive upon this plaintiff and upon this Court, and this Court has no right, authority, or jurisdiction to enter upon, attempt to decide, to decide or re-litigate such questions of fact as were previously determined by such special Tribunal.

Fourteenth:

Because the undisputed evidence in this case shows that
more than five years have elapsed after this plaintiff
177 had actual knowledge and legal notice of the establish-
ment and construction of Drainage Ditch No. 1 and 2,
and during all of said time this plaintiff took no steps to ques-
tion or stop said proceedings, and the expenditure of over

Two Hundred and Fifty Thousand Dollars (\$250,000.00) thereon and plaintiff's bill of complaint wholly fails to make any distinct averments, and none of the evidence tends to excuse this unwarranted delay, and for these reasons this Court should not come to its relief.

Fifteenth:

Because the drainage statutes of South Dakota provide a fixed and determinable basis, method and rule of apportionment of benefits, and, pursuant thereto, the Board of County Commissioners of Minnehaha County, South Dakota, applied such fixed and determinable basis, method and rule of apportionment of benefits, which will probably produce approximately correct general results as to the benefits to plaintiff's property, as well as all other [property] in the drainage district, and, therefore, such apportionment is not arbitrary, and this Court cannot usurp the power of the Board to equalize the proportion of benefits as provided by said statutes.

Sixteenth:

Because the evidence wholly failed to show that there would result a multiplicity of suits, or irreparable injury, or a cloud cast upon the plaintiff's property, and also failed to show any circumstances to bring the case under same recognized head of equity jurisdiction, and the evidence does show that the plaintiff had a plain, adequate and complete remedy at law.

Eighteenth:

Because all the evidence now shows that there is no jurisdictional amount in controversy in this action, and that, therefore, this action was prematurely brought, in that the 178 apportionment had not been equalized, and no tax had ever been assessed or levied against the plaintiff's property, or any other property, and that the amount of such tax, if any, and, therefore, the amount in controversy herein, has not been, and cannot be, determined until after such equalization and final assessment has been made, as provided by the law of South Dakota, and the uncontradicted evidence shows that said equalization of the apportionment of benefits was prevented by the temporary restraining order and the final decree in this case.

Nineteenth:

The Court erred in not adjudging and decreeing that on October 3, 1916, Drainage Ditch No. 1 and 2 was duly and legally established by the Board of County Commissioners of

Minnehaha County, South Dakota, for a public purpose, including but not limited to the drainage of agricultural lands, for the reason, that the Constitution of the State of South Dakota and Section 8458 of the Revised Code of South Dakota, 1919, provide therefor.

Twentieth:

The Court erred in not adjudging and decreeing that the proceedings taken by the Board of County Commissioners of Minnehaha County, South Dakota, upon the petition of the City of Sioux Falls, F. L. Blackman and others, filed with the County Auditor on August 3, 1916, and upon which Drainage Ditch No. 1 and 2 was established on October 3, 1916, constituted the establishment of an entirely new drainage proceeding, and gave the Board of County Commissioners jurisdiction to construct such drainage as a new project, for the reason that such petition prayed for the construction of a drainage ditch over the exact line of drainage ditches 179 previously abandoned, and contemplated a more comprehensive and perfect drainage system for the purpose of draining and benefitting additional property, in compliance with and as authorized by Sections 8458, 8476 and 8489 of the Revised Code of South Dakota, 1919, and the undisputed evidence shows the work done consisted of about eight miles of canalizing the river, doubling the capacity of the ditch and outlet, building dikes, dams and controlling works, and an adequate spillway or outlet to said ditch, at a total cost of over Two Hundred Fifty-five Thousand Dollars (\$255,000.00), which was more than double the amount of the total assessments for old Drainage Ditch No. 1 and Drainage Ditch No. 2, which was the sum of One Hundred Twenty-seven Thousand, Seven Hundred Six and 10/100 Dollars.

Twenty-First:

The Court erred in not adjudging and decreeing that plaintiff's land was subject to assessment for benefits which it received, if any, under the establishment and construction of Drainage Ditch No. 1 and 2, without regard to whether its lands had been assessed and included within the assessment district of Drainage Ditch No. 1 and Drainage Ditch No. 2, or not, for the reason that Drainage Ditch No. 1 and 2, as established on October 3, 1916, was established as a new project upon due and legal notice to the plaintiff, and in the manner provided by the drainage statutes of South Dakota.

Twenty-second:

The Court erred in entering its decree herein in favor of the plaintiff and against the defendants, upon this plaintiff's bill of complaint and the amendment allowed thereto, for the reason that said plaintiff's offer to amend said bill of complaint came too late, and long after plaintiff's attention was called to the fact that its bill contained no allegation 180 of arbitrary acts by objection to the introduction of testimony during the trial, and after the entire case had been tried, argued and submitted, and briefs had been filed twenty days, which amendment injected an entirely new cause of action into the bill of complaint, and to overcome which, the Court refused to receive evidence showing or tending to show that plaintiff's property was receiving a substantial benefit, and that the apportionment was not arbitrary and which amendment, when offered, did not conform to the facts established upon said trial, in that said proposed amendment assumed that the Board of County Commissioners were acting under jurisdiction obtained in the establishment of old Drainage Ditch No. 1 and Drainage Ditch No. 2, and not under the new drainage proceedings designated as "Drainage Ditch No. 1 and 2", as shown by the undisputed evidence; assumed that the equalization of the proportion of benefits had been had and assessment duly made thereon, [hereas], all the evidence shows that merely a tentative fixing of the proportion of benefits had been made; Assumed that the property of plaintiff had not been, and never could be, benefited by old Drainage Ditch No. 1 and Drainage Ditch No. 2 while the uncontradicted evidence shows a substantial benefit from the construction of Drainage Ditch No. 1 and 2; assumed that the assessment for benefits had been made, while the uncontradicted evidence shows that no equalization or assessment of benefits had ever been made, and cannot be made until after the proportion of benefits has been equalized and finally fixed; assumed that the acts of the Board in making the so-called assessment were arbitrary, while the evidence shows that no assessment or equalization of benefit has ever been made; and further, said amendment does not attack the drainage law as arbitrary, or the unit provided by law as arbitrary but alleges that the acts of the Board in fixing the amount 181 of the benefits to plaintiff's property were arbitrary, speculative and unjust, whereas, all the evidence shows that the Board, with its Engineer, personally inspected the property affected and exercised its honest judgment as to the benefits received by plaintiff's property, using the fixed and determinable basis, method and rule of apportionment pro-

vided by the drainage law of South Dakota, and the undisputed evidence further shows on behalf of both parties that some benefit was received by the plaintiff; assumed the amount of the assessment and made an issue as to the amount of benefit, if any, plaintiff received, which matter this Court has no jurisdiction to determine; assumed and made an issue of the inequality of the so-called assessment upon plaintiff's property, and other agricultural land, which issue is within the exclusive jurisdiction of the State Tribunal, and this Court in this action has no jurisdiction to try or determine the same.

Twenty-third:

The Court erred in not adjudging and decreeing that the plaintiff herein is not in a position to question the regularity of the proceedings in the establishment and construction of Drainage Ditch No. 1 and 2, as an independent drainage proceeding, as it, by its officers and agents, had actual knowledge and legal notice of the proceedings taken to establish said drainage; as it, through its officers and agents, saw the work in the Court of construction, assisted in the work of construction thereof, by furnishing services and materials used therein, with knowledge that such services and materials were furnished therefor, and were being used in the construction of said drainage, and received compensation for said services and materials so furnished and used; as it, through its officers

and agents, urged and encouraged the Board of County Commissioners to take the action and do the work

which was done under such drainage proceedings for its benefit, and as it is now, and has been for more than three years last past, receiving protection and substantial benefits from said drainage construction, with the full knowledge, that there was no manner of paying for such construction except by assessment upon the property benefited, included in which was plaintiff's property, all without protest against the doing of any such work, or the extent or manner thereof, until such work and drainage project had been substantially completed, and until this action was brought to restrain the making of an assessment to pay for the cost of said construction, and, therefore, the plaintiff is now estopped from questioning said proceedings and maintaining this action.

Twenty-fourth:

The judgment and decree herein is not supported by the evidence, and is contrary to law, in that it appears from the undisputed evidence that the outlet to old Drainage Ditch No.

1 was destroyed and abandoned and thereby said ditch abandoned and that the petition of the City of Sioux Falls, F. L. Blackman and others, filed August 3, 1916, fully complied with the requirements of the drainage statutes of South Dakota for the establishment of a new drainage, and that thereafter all the statutory requirements were duly and fully followed and pursued, and such proceedings were had that, pursuant to statute, on October 3, 1916, the Board of County Commissioners of Minnehaha County, upon due notice and hearing of said petition, ordered and adjudged the establishment of said drainage as a new project and drainage ditch, and designated it as "Drainage Ditch No. 1 and 2", and further adjudged and decreed that the construction thereof was for a public purpose, and was necessary and practicable for draining agricultural lands, and that the property of this plaintiff was included within the drainage area, and affected

183 thereby, which property was described in the petition, notice, and said resolution and judgment, which resolution and judgment was never appealed from by this plaintiff, or anyone, and is now in full force and effect, and has been for more than six years last past; that there is no evidence at all in the record that the plaintiff has been in any manner prevented from fully presenting its defense, if any, to the allegations and prayer contained in said petition of the City of Sioux Falls, F. L. Blackman, et al, or from fully trying all the issues herein presented, or that the jurisdiction of the Board of County Commissioners was imposed upon.

And it further appears from the undisputed evidence that an apportionment of benefits has been made for the payment of the costs of construction of said Drainage Ditch No. 1 and 2, and that the law provides, and the County Commissioners applied, after personal inspection, and exercising their best judgment, a fixed and determinable basis, method and rule of apportionment of benefits, which will probably produce approximately correct general results as to the plaintiff's property, as well as all other property in the drainage district; and that no equalization of benefits or assessment has been had thereon, and that no legal charge or servitude has yet been placed upon the property of plaintiff, or anyone else, and that this action is premature.

Twenty-fifth:

The said decree is not sustained by the evidence, but is contrary thereto, in that it appears from the undisputed evidence that Drainage Ditch No. 1 and 2 was established as a new ditch by the Board of County Commissioners of Minne-

haha County, South Dakota, on October 3, 1916, included in which drainage district was plaintiff's property, and of which proceedings this plaintiff had knowledge and legal notice for more than six years last past, and has never taken any
184 steps prior to the institution of this action, to question or stop said proceedings, and the expenditure of over Two Hundred and Fifty Thousand Dollars (\$250,000.00) thereon, and has wholly failed to establish any lawful excuse for said unwarranted delay; and that all steps taken by the Board of County Commissioners leading up to and the establishment of said Drainage Ditch No. 1 and 2, were warranted in law, and said Board was lawfully acting under and in conformity with the Constitution and drainage statutes of the State of South Dakota, and that said drainage ditch was petitioned for, and lawfully established for a public use and purpose, and for the purpose of draining agricultural lands; that the apportionment of benefits, as made by the Board of County Commissioners, was made pursuant to and in conformity with the method and rule laid down by the drainage statutes of South Dakota, and after a personal inspection and deliberation by said Board, applied in conformity therewith in such a manner as will probably produce approximately correct general results as to the benefits enjoyed by plaintiff's property, as well as all other property in the drainage district and that plaintiff's property is enjoying substantially the amount of benefit apportioned to it.

Twenty-sixth:

For all the reasons and errors aforesaid, the Court erred in not entering and rendering a decree in favor of the defendants, and against the plaintiff, dismissing its bill of complaint, and denying the injunction herein, and in not entering its judgment and decree in accordance with the prayer of defendants' answers.

Wherefore, defendants pray that the judgment and decree of said Court be reversed, with directions to enter a
185 decree in favor of the defendants and against the plaintiff, dismissing plaintiff's bill, as prayed for in defendants' answers.

ELBERT O. JONES and
L. E. WAGGONER
Solicitor for Defendants.

NORMAN B. BARTLETT
Solicitor for Intervening Defendants.

Endorsed: Filed in the District Court on Aug. 25, 1922, at
5 P. M.

186 (Petition for appeal and allowance thereof.)

To The Honorable James D. Elliott, Judge of the United States District Court Within and for the Southern Division of the District of South Dakota:

The above named defendants and intervening defendants feeling themselves aggrieved by the decree made and entered in this case on the 28th day of February A. D. 1922, do hereby appeal from said decree to the Circuit Court of Appeals, for the Eighth Circuit, for the reasons specified in the Assignment of Errors, which is filed herewith, and they pray that their appeal be allowed, and that citation [issued], as 187 provided by law, and that a transcript of the record, proceedings and papers, upon which said decree was based, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Eighth Circuit, sitting at St. Paul, Minnesota, and your petitioners further pray that a proper order touching the security to be required of them to perfect their appeal be made.

**ELBERT O. JONES and
L. E. WAGGONER
NORMAN B. BARTLETT
Solicitors for Defendants and Intervening Defendants.**

The foregoing petition granted, and the appeal allowed upon giving bond, conditioned as required by law, in the sum of One Thousand and No/100 Dollars (\$1,000.00).

**JAS. D. ELLIOTT
Judge of the United States District Court within and for the Southern Division of the District of South Dakota.**

Endorsed: Filed in the District Court of Aug. 25, 1922, at 5 P. M.

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Bond on Appeal.

Know All Men By These Presents: That we, A. G. Risty, et al, defendants and Minnehaha National Bank of Sioux Falls, South Dakota, et al, intervening defendants, as Prin-

cipals, and the Southern Surety Company of Des Moines, Iowa, as surety, acknowledge ourselves to be jointly indebted to the Chicago, Rock Island and Pacific Railway Company, a Corporation, appellee in the above cause, in the sum of One Thousand Dollars (\$1,000.00), conditioned that, whereas on the 28th day of February, A. D. 1922, in the District Court of the United States, for the Southern Division of the District of

South Dakota, in a suit pending in that court wherein
190 the Chicago, Rock Island and Pacific Railway Company,

a Corporation, was plaintiff, and A. G. Risty, et al, were defendants, and the Minnehaha National Bank of Sioux Falls, South Dakota et al, were intervening defendants, numbered on the Equity Docket as 98, a decree was rendered against the said A. G. Risty, et al, defendants, and the Minnehaha National Bank of Sioux Falls, South Dakota, et al, intervening defendants, and the said A. G. Risty et al, defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al, intervening defendants, having obtained an appeal to the Circuit Court of Appeals for the Eighth Circuit, and filed a copy thereof in the office of the Clerk of the Court, to reverse the said decree, and a citation directed to the said Chicago, Rock Island and Pacific Railway Company, citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals, for the Eighth Circuit, to be held in the City of St. Paul, in the State of Minnesota, on the 2nd day of May, A. D. 1923, next.

Now, if the said A. G. Risty, et al, defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al, intervening defendants, shall prosecute their appeal to effect, and answer all costs if they fail to make their plea good, then the above obligation to be void else to remain in full force and virtue.

(Southern Surety
Corporate Seal)

A. G. RISTY

Signing for all Defendants.

THE MINNEHAHA NATIONAL
BANK OF SIOUX FALLS,
H. V. HARLAN, V. P.

Signing for all Intervening Defendants.

SOUTHERN SURETY
COMPANY OF DES MOINES,
IA.

By C. T. Charnock, Attorney in fact
Surety.

191 State of South Dakota,
County of Minnehaha—ss.

On this 15th day of August, 1922, before me H. B. Charnock, a notary public in and for said County, and State, personally appeared C. T. Charnock, well known to me to be the Attorney-in-fact of the Southern Surety Company, a corporation that is described in and that executed the above and foregoing instrument and duly acknowledged to me that said corporation executed the same.

And I further certify that at the same time the said C. T. Charnock exhibited to me the original certificate of authority issued to said Company by the Commissioner of the State of South Dakota, and that the following is a true, perfect and complete copy thereof:

STATE OF SOUTH DAKOTA
DEPARTMENT OF INSURANCE,
Office of the Commissioner
Company's Certificate of Authority
No. 11050

[Renewable] Annually. Whereas, The Southern Surety Company, a corporation organized under the Laws of Iowa, has filed in this Office a sworn statement exhibiting its condition of business for the year ending December 31st, 1921, conformable to the requirements of the Laws of this State regulating the business of Insurance, and

Whereas, The said Company has filed in this office a duly certified copy of its charter, with certificate of organization, and has complied with all the requirements of the Insurance Laws aforesaid;

Now Therefore, I, W. N. Van Camp, Commissioner of Insurance of the State of South Dakota, pursuant to the provisions of said laws do hereby certify that the above 192 named Company is fully empowered through its authorized agents to transact its appropriate business of Accident and Health, Liability, Workmen's Compensation, Fidelity, Surety, Burglary, Theft, Plate Glass and Automobile Insurance in this State according to the Laws thereof, until the last day of February, 1923.

In Testimony Whereof, I have hereunto set my hand and official seal at Pierre, this First Day of March, A. D. 1922.

(Notarial Seal)

W. N. VAN CAMP,
Commissioner of Insurance.
By W. J. Madden,
Deputy Commissioner.

H. B. CHARNOCK,
Notary Public, South Dakota.

The foregoing bond is hereby approved.

JAS. D. ELLIOTT,
Judge of the United States District Court
Within and for the Southern Division of
the District of South Dakota.

Endorsed: Filed in the District Court on Aug. 25, 1922, at
5 P. M.

194 (Notice to plaintiff of lodgment of statement of evidence in District Clerk's office.)

To A. B. Fairbank, Solicitor for Chicago, Rock Island & Pacific Railway Company, Plaintiff:

Please take notice that the Appellants have prepared a Statement of the evidence to be included in the record upon the appeal of the above entitled matter to the Circuit Court of Appeals, for the Eighth Circuit, and has lodged the same in the office of the Clerk of this Court for your examination, (a copy of which Statement is herewith served upon you).

You will further take notice that the Appellants will ask the Court, at the Government Building, in the City of Sioux Falls, in said District of South Dakota, at ten o'clock in the forenoon of the 3 day of October, A. D. 1922, or as soon thereafter as counsel can be heard, to approve said Statement.

Dated this 23 day of September, A. D. 1922.

E. O. JONES,
N. B. BARTLETT,
Solicitors for Appellants.

Service of the foregoing Notice this 23 day of September, A. D. 1922, is hereby acknowledged, also service of the Statement therein referred to.

BOYCE, WARREN & FAIRBANK,
Solicitor for the Chicago, Rock Island &
Pacific Railway Company, Plaintiff.

195 Endorsed: Filed in the District Court on Sept. 23,
1922.

196 (Praecepice for Transcript.)

The Clerk of this Court is hereby directed to prepare and certify a transcript of the record in the above entitled case for the use of the Circuit Court of Appeals of the United States, for the Eighth Circuit, by including therein the following:

1. The Bill of Complaint, except the title and verification, and except the Exhibits thereto attached.
2. Order Allowing Intervention.
3. The following portions of Defendants' Answer, viz:
 - (a) Paragraphs "A", "B", "C", "D", and "F" of Defendants' Special Answer.
 - (b) Introduction and Paragraphs "First" to "Nineteenth" inclusive, of Defendants' General Answer; and
 - (c) Paragraphs "VIII", "XI", "XIII" and "XIV" of Defendants' Affirmative Defense, together with the prayer.
4. The Statement of the Evidence Submitted, and Approved by the Court.
5. Order to Show Cause for Permission to Amend Bill, and Affidavit supporting the same.
- 197 6. Return to Order to Show Cause and Affidavit.
7. Order Permitting Amendment of Bill, and Exception taken to said Order.
8. Amendment to Bill.
9. The Opinion and Decree of the District Court.
10. Assignments of Error.
11. Petition for Appeal.
12. Order Allowing Appeal.
13. Bond upon Appeal, and Approval of same.
14. Notice of Deposit of Statement of Evidence with Clerk and Proof of Service thereof.
15. Approval of Court of the Statement of the Evidence.

16. Citation in Appeal, and Service thereof.

17. Praeceipe and Clerk's Certificate.

Dated at Sioux Falls, South Dakota, this 23 day of September, A. D., 1922.

E. O. JONES
N. B. BARTLETT,
Solicitors for Appellants.

Endorsed: Filed in the District Court on Sept. 23, 1922.

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(Additional praecipe for transcript.)

The Clerk of this court is hereby directed to incorporate into the transcript on appeal in the above entitled cause, for the use of the Circuit Court of Appeals of the United States for the Eighth Circuit, the following additional portions of the record, which are not indicated in the precipe filed by appellants, to-wit:

1. The title of the case as a part of and as it appears in the bill of complaint and Exhibit "B" and Exhibit "C" attached to and made a part of the bill of complaint.

2. The title of the case as a part of and as it appears in the defendant's answer.

3. Paragraphs I, VI and XII of defendant's affirmative defense, as it appears as a part of defendant's answer.

4. The following exhibits made a part of the defendant's answer, to-wit: The petition of F. L. Blackman, and others, upon which the proceedings with reference to Drainage Ditch No. 1 and No. 2 are alleged to have been had; the order for filing said petition; the resolution for survey under said petition; the resolution fixing line and width of the ditch and time and place for hearing the petition of F. L. Blackman, and others; the published notice of hearing said petition, (said notice not being attached to the answer but having been filed after the filing of the answer and on November 28, 1921, together with the stipulation that it might be considered as a part of the answer), and the resolution establishing Drainage Ditch No. 1 and 2. All of said exhibits appear as a part of the answer and to be inserted as a part of said answer.

Dated this 23rd day of October 1922.

O'BRIEN, STONE, HORN &
STRINGER,
BOYCE, WARREN & FAIRBANK,
Solicitors for Appellee.

Due service of the within Precipe this 24 day of Oct. 1922
is hereby admitted.

E. O. JONES, Attorney for Def.

Endorsed: Filed in the District Court on Oct. 24, 1922, at
4 P. M.

202

(Statement of Evidence.)

(Filed in U. S. District Court on January 10, 1923.)

The above entitled suit came on for hearing before the Court on December 15th, 1921, before the Honorable J. D. Elliott, Presiding Judge, plaintiff appearing by A. B. Fairbank, Esq., its solicitor, defendants appearing by Mr. E. O. Jones, their solicitor, and the intervening defendants appearing by Messrs. Porter & Bartlett, their Solicitors, the following proceedings were had:

203

Evidence of Plaintiff.

F. E. WARD, called and sworn as a witness on behalf of the plaintiff, testified as follows:

Stipulation.

"It is stipulated and agreed between all parties that the testimony received in these consolidated cases shall be considered as received in each case, so far as such testimony is pertinent to such case, and that such testimony apply only to that case."

Q. You may state your name.

The defendants now move the Court that plaintiff's bills of complaint herein be dismissed and the restraining order set aside, for the reasons that the said bills of complaint fail to state any matter of equity entitling the plaintiffs to the relief prayed for, nor are the facts stated therein sufficient to entitle plaintiffs to any relief against these defendants.

For the further reason that this court has no jurisdiction over these matters, because plaintiff's bills of complaint here-

in do not set forth any matter of equity in addition to the pretended constitutional question, said complaints not setting forth facts sufficient from which this court can infer or presume that there will result a multiplicity of suits, irreparable injury or a cloud cast upon the title of their property, or any special circumstances to bring the cases under some recognized head of equity jurisdiction, it affirmatively appearing that the plaintiffs have a plain, adequate and complete remedy at law.

204 For the further reason that it affirmatively appears from the fact of the bills of complaint and record, that there is no jurisdictional amount in controversy at this time and these actions are premature and that no assessment or tax has in fact been equalized, assessed or levied, and that the state tribunal having jurisdiction thereof was enjoined by these proceedings before it had opportunity to perform its statutory duties, equalize or determine or fix the amounts of benefits, assessments or tax chargeable against the property of the plaintiffs, if any, and if the plaintiffs will establish that they received no benefits by reason of the ditch in controversy, as alleged in said bills, before the state tribunal appointed by law to equalize the apportionments of benefits, then no assessment or tax against their property will be made, and they can suffer no irreparable injury, multiplicity of suits, nor will any cloud be cast upon the title to their property.

For the further reason that the findings and determinations of the state tribunal upon questions of fact before them, are conclusive upon this court in this action, this court having no original jurisdiction by a bill in equity to reject or control the proceedings of that tribunal, the same being the Board of County Commissioners of Minnehaha County, South Dakota, in these ditch proceedings. Motion denied, defendants and intervening defendants excepting.

The defendants and intervening defendants then objected to the introduction of any testimony for the reason and on the ground urged in the motions to dismiss. Objection overruled. Defendants and intervening defendants excepting.

(Testimony of Witness F. E. Ward)

I am the auditor of Minnehaha County, South Dakota;
205 drainage ditch records A and B and commissioners
record 5 and 6 are part of the records of Minnehaha
County.

Plaintiff offered in evidence the following portions of Drainage Ditch Record A.

July 1, 1907.

Petition for Drainage.

To the Honorable Board of County Commissioners of Minne-haha County, South Dakota:

Your petitioner respectfully represents: That he is a resident of the City of Sioux Falls in said County; that he is the owner of certain lands in the valley of the Big Sioux River north and west of the City of Sioux Falls in said County, viz: Blocks Three (3) and Thirty-one (31) of Meredith's First Addition to Sioux Falls, according to the recorded plat thereof; the Northwest Quarter of the South West Quarter of Section Eighteen (18), and the South West Quarter of the North West Quarter of said Section Eighteen (18), except the railroad right of way, all in Township One Hundred and One (101) North, of Range Forty Nine (49); also a certain tract or parcel of land bounded and described as follows, to-wit: Commencing at a point twenty-four (24) rods north of the southeast corner of the North West Quarter of Section Thirty Two (32), in Township One Hundred and Two (102) North, of Range Forty Nine (49); running thence north ten (10) rods; thence west eighty (80) rods; thence south ten (10) rods; thence east eighty (80) rods to the place of beginning all of which lands will be affected by the drainage herein proposed;

Your petitioner further represents that it is necessary for the drainage of agricultural lands in said Big Sioux Valley between the dam of the Cascade Milling Company in the City of Sioux Falls and the City of Dell Rapids that the proposed drainage be established.

Your petitioner further represents that the establishment of such drainage will be conducive to the public health, convenience and welfare of the inhabitants of the City of Sioux Falls and of the inhabitants of the Big Sioux Valley between Sioux Falls and Dell Rapids that the establishment of such drainage will prevent the frequent loss of many thousands of acres of crops and meadow in said valley and will prevent great damage to the buildings and their contents; and will prevent great damage to the highways in said County, and also to the railroad tracks and rights of way of the Chicago, Milwaukee & St. Paul Railway Company and of the South Dakota Central Railway in said valley; and will prevent damage and

destruction of many bridges and their approaches in said valley;

Your petitioner further represents that the general purpose of said proposed drainage is, among other things, to prevent the annual or occasional flooding of lands in said valley caused by high water in said river, by providing a drain to carry off all the water of said river above its normal stage or above the point where it overflows its banks, that such drainage can be accomplished by establishing a drain from an initial point near the place where said river crosses the center line of Section Five (5) in Township One Hundred and One (101) North of Range Forty Nine (49), and running thence southeasterly across said Section Five (5), Section Four (4) and the North Half of Section Nine (9), all in Township One Hundred and One (101) North of Range Forty nine (49) and east of the buildings of the State Penitentiary to a 207 terminal point on said river in the City of Sioux Falls near the center of Section Nine (9) in said Township, the length of which will be approximately one and three fourths miles.

Your petitioner further represents that the territory [likely] to be affected thereby is that portion of the Townships of Dell Rapids, Sverdrup, Mapleton, Wayne and Sioux Falls and of the City of Sioux Falls in the immediate valley of the Big Sioux River subject to overflow from said river.

Dated July 1, 1907.

WILLIAM H. LYON

Petitioner.

Said petition was duly verified and filed with the County Auditor on the first day of July, 1907.

208 Plaintiff offered and there was received in evidence pages 562 and 563 and the first two lines of 564 of Commissioners' Record 5, it being a resolution of the Board of County Commissioners fixing the route and width of the proposed ditch and the time and place of hearing the petition of W. H. Lyon for the proposed drainage ditch thereafter established as Drainage Ditch No. 1.

This resolution is not printed at length herein because it contains matter not deemed of importance. It established the line of Drainage Ditch No. 1 as follows: Commencing 58 feet west and 135 feet north of the southeast corner of Section 29,

Township 102, Range 49, thence south parallel to the adjacent highway 2085 feet to station No. 114; also commencing 674 feet north and about 35 degrees west of Station No. 114; thence southeasterly 674 feet to said Station 114, thence south and parallel to said highway 7700 feet to Station No. 37, thence south 45 degrees, east 3700 feet to Station Zero (0), thence south 59 degrees, 36', east to the Big Sioux River.

It also contains the following provisions: "Be it resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the width of said drainage ditch be and it is hereby fixed at 40 feet at the bottom thereof, with a side slope of one foot to one."

Plaintiff offered in evidence the following part of Commissioner's Record 5:

209

Sioux Falls, S. D. Dec. 31, 1907.

Pursuant to adjournment, at 2 o'clock P. M. Tuesday, December 31, 1907, the Board of County Commissioners met in their room at the county court house.

Present:

Dist. No. 5: Thomas McKinnon, Chairman,

Dist. No. 1: Charles Harvey.

Dist. No. 2: John E. Johnson,

Dist. No. 3: Alfred Acheson.

Dist. No. 4: J. D. Howard.

C. E. Hill, County Auditor, Clerk.

Mr. Howard offered the following resolution:

Resolution Establishing Drainage Ditch No. 1:

The matter of the petition of William H. Lyon for the establishment of a drainage ditch filed in the County Auditor's office of Minnehaha County, South Dakota, on July 1, 1907, the said drainage ditch having been heretofore described and named "Drainage Ditch No. 1", coming on to be heard by the Board of County Commissioners at a regularly adjourned meeting, on Monday, December 30, 1907, pursuant to notice heretofore given, and written objections thereto having been filed by Martin Oien, et al, and by Joseph C. Carpenter, and by the Chicago, Milwaukee and St. Paul Railway Co. and the claims of said parties having been presented orally by their

counsel, and William H. Lyon, F. L. Blackman, O. Benson and others having appeared in behalf of said petition, and said hearing having been adjourned to this 31st day of December, 1907, and this Board having fully heard and considered said petition and all matters in opposition to and in support of the same; Now Therefore

Be it Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that said Drainage Ditch No. 1, is [condicive] to the public health, convenience and welfare, and is necessary and practicable for draining agricultural lands, and it is so found:

210 Be it further Resolved that said Drainage Ditch No. 1, be and is hereby established:

Be It Further Resolved that this Board proceed to assess the damages sustained by each tract of land, or other property through which the same shall pass, and damages as compensation for the land taken for the route of such drainage.

Mr. Howard moved the adoption of said resolution, and that the vote be taken by districts. Mr. Harvey seconded the motion. Upon roll call,

Charles Harvey, Dist. No. 1 voted, Yes;

J. E. Johnson, Dist. No. 2 voted No;

Alfred Aeheson, Dist. No. 3 voted No;

J. D. Howard, Dist. No. 4 voted Yes;

Thomas McKinnon, Dist. No. 5 voted yes;

The Chairman declared the resolution adopted.

Plaintiff offered in evidence the following portions of Ditch Record A;

April 11, 1908.

Resolution Assessing Benefits.

Whereas, The Board of County Commissioners of Minnehaha County, South Dakota, has established Drainage Ditch No. 1, and has fixed the damages arising therefrom, and has been investigating and considering the proportion of benefits that will accrue to the lands, tracts and lots within the drainage area of said Drainage Ditch; and

Whereas, in arriving at this determination of the proportion of benefits it has considered, not only the benefits which will accrue directly by virtue of the construction of said Drainage Ditch, but also the indirect benefits by virtue of said drainage being an outlet for connecting drains that may hereafter be constructed, and particularly is this so in reference to the lands within the drainage area lying north of a line running east and west through the center of Section Twenty Nine (29) Mapleton Township; and

Whereas, the number of acres set opposite each tract hereinafter described represents the actual number of acres of land within said tract that are benefitted, and excluding therefrom lands taken by said Drainage Ditch, and excluding also lands embraced within laid out highways, and in fixing the proportion of benefits to platted lots along said Drainage Ditch, the land taken by the drainage is excluded; and

Whereas, in the use of the word "tract" in said list of descriptions reference is had to the tract as it appears upon the plat of the County Auditor's Subdivision of the particular quarter section in which the land is located on file in the Register of Deeds office; and

Whereas, in the consideration of benefits said Board has assumed that the North East Quarter of the North East Quarter of the South West Quarter of Section Thirty Three (33) in Township One Hundred and Two (102) of Range Forty Nine (49) West of the Fifth P. M., owned by the state of South Dakota, and containing ten acres is benefitted "one", and taking the same as a unit;

Therefore, Be it Resolved that the benefits to the following described lands, tracts and lots; the benefits to the City of Sioux Falls; the benefits to the Townships of Sverdrup, Mapleton, Sioux Falls and Wayne; the benefits to the County of Minnehaha; and the benefits to the several Railroad Companies hereinafter described, arising and accruing by the construction of Drainage Ditch No. 1, be, and they are hereby fixed and determined in the following proportions, viz:

212

Name of Owner	Description	Sec- tion	Town- ship	Range	Acres	Pro- portion of Bene- fits
Esten E. Eggen	E $\frac{1}{2}$ of NE $\frac{1}{4}$	31	102	49	5	.45
Thomas Paulson	E $\frac{1}{2}$ of SE $\frac{1}{4}$	31	102	49	43	3.87

State of South Dakota E½ of NE¼ 32 102 49 72.9 9.11

Ellen Berg and (Except right of way
Mary Schjodt of South Dakota Cen-
 tral Ry. Co.) NW¼
 of NE¼ 32 102 49 35.88 4.48

213 Here follows some twenty-two pages of similar assessments of individual owners of lands, describing lands in the following sections, townships and ranges:

Section	Township	Range
31	102	49
32	"	"
33	"	"
29	"	"
28	"	"
21	"	"
20	"	"
19	"	"
17	"	"
16	"	"
9	"	"
8	"	"
5	"	"
4	"	"
3	"	"
34	103	"
33	"	"
32	"	"
29	"	"
28	"	"
27	101	"
4	"	"
5	"	"
6	"	"
7	"	"
8	"	"
17	"	"
18	"	"
19	"	"
30	"	"
13	101	50
24	"	"
25	"	"

Also Lots in the following additions of Sioux Falls, South Dakota:

Berwick Addition

Brookings "

Brooks "

Bunkers "

Carpenters "

Central Park "

Englewood "

Harrison "

Lakeview "

Lincoln Park "

McClellan "

Meredith "

Millard Park "

North Boulevard Addition

North Park "

North Park 2nd "

Sioux Falls Improvement Addition

214 Summit Addition

West Lawn "

West Park "

Town of Renner

Olson's Addition to Renner

215 And also the following railways:

Name of Owner.	Description	Acres.	Proportion of Benefits
Chicago, Milwaukee & St. Paul Railway Co.	Right of way as now laid out and located across sections 28, 29, and 33, township 103, range 49, west 5th p. m.	25.02	3.75
Chicago, Milwaukee & St. Paul Railway Co.	Right of way as now laid out and located across sections 4, 9, 16, 21, 28 and 33, township 102, range 49, west 5th p. m. Sioux Falls and Egan line....	72.50	15.41
Chicago, Milwaukee & St. Paul Railway Co.	Right of way as now laid out and located across sections 5, 8, and 9, township 102, range 49 west 5th p. m. (Sioux Falls and Madison line)	17.30	2.60
Chicago, Milwaukee & St. Paul Railway Co.	Right of way as now laid out and located across sections 4 and 9, township 101, range 49, west 5th p. m.	17.05	5.12
South Dakota Central Railway Co.	Right of way as now laid out and located across sections 29 and 32, township 102, range 49 west 5th p. m.	11.06	3.32

South Dakota Central Rail-way Co.	Right of way as now laid out and located across sections 4, 5, and 9, township 101, range 49, west 5th p. m.....	17.72	5.32
Chicago, St. Paul, Minneapolis & Omaha Railroad Co.	Right of way as now laid out and located across section 18, Township 101, range 49, west of 5th p. m.	12.18	3.65

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Name of Owner	Description	Acres	Proportion of Benefits
Chicago, St. Paul, Minneapolis & Omaha Railroad Co.	Right of way as now laid out and located across section 13, Township 101, range 50, West 5th p. m.	16.88	5.06
Sverdrup Town-ship.	Seven miles and 84 rods of laid out and established highways within the drainage area.		2.9
Mapleton Township.	Twelve miles and 52 rods of laid out and established highways within the drainage area.		7.73
Sioux Falls Township.	Two and onehalf miles of laid out and established highways within the drainage area....		3.2
Wayne Township	Three quarters of a mile of laid out and established highways within the drainage area.		.6
City of Sioux Falls	1½ miles of highways and dedicated streets within the drainage area9
Minnehaha County	Benefits arising from the safety to and preservation of bridges within the drainage area ..		25.

Be It Further Resolved that Tuesday, the 5th day of May, 1908, at two o'clock P. M. at the office of the County Auditor of said County be and it is hereby fixed as the time and place for the equalization of such proportion of benefits, and that notice thereof be given, in accordance with the provisions of See 6. of Chap. 134 of the Laws of 1907 of the State of South Dakota, the same to be signed by the Chairman of this Board and attested by the County Auditor, by publication in the Sioux Falls Weekly Argus-Leader, once in each week for two consecutive weekly issues, and one further publication in the Sioux Falls Daily Argus Leader, and by posting copies of such notice in at least three public places near the route of said Drainage Ditch, the said posting and the last of such publications to be made at least 10 days prior to the time of said hearing.

Adopted April 11, 1908

THOMAS McKINNON,
Chairman.

Attested:

C. E. Hill,
County Auditor.

(Seal)

Filed in the office of the Auditor of Minnehaha County,
S. D. this 8th day of April, 1908.

C. E. HILL
County Auditor.

That in the foregoing assessment of benefits the Chicago,
Rock Island and Pacific Railway and no property belonging
to the said railway was in any way described or assessed.

218 Plaintiff offered in evidence pages 53 to 61 inclusive of Ditch Record A, being the record of notice of hearing upon the equalization of benefits with reference to Ditch No. 1. In this notice of hearing the same persons and the same property is described as in the "resolution assessing benefits".

Plaintiff offered in evidence pages 260 to 268 inclusive of Ditch Record A, the same being a record of the levying of the assessment for Drainage Ditch No. 1. In this assessment the same persons and the same property was assessed as is described in the "resolution assessing benefits." This record shows that the commissioners ascertained and determined the entire cost of Drainage Ditch No. 1 to be the sum of \$46,600.10.

Plaintiff offered in evidence pages 94 to 95 and a portion of page 96 of Ditch Record A, as follows:

April 10, 1908.
Petition for Drainage.

To the Honorable Board of County Commissioners of Minnehaha County, South Dakota:

Your petitioners respectfully represent that they are all residents of the Township of Mapleton in said County, and that each of them is the owner of certain lands in said Township in the valley of the Big Sioux River as follows: The said Iver R. Peterson is the owner of the South Half of the

South West Quarter of the North East Quarter of Section Seventeen (17) and the South Half of the East Thirteen (13) acres of the South East Quarter of the North West Quarter of Section Seventeen (17); that the said Bernt Mekvold is the owner of the South-West Quarter of the North West

Quarter of Section Seventeen (17) and the West Twenty-six and Two-Thirds (26 2/3) acres of the South

219 East Quarter of the North West Quarter of Section Seventeen (17); that the said William O. Quiney is the owner of the West Half of the North West Quarter of Section Twenty (20); and that the said Iver I. Nelson is the owner of the East Half of the South West Quarter of Section Seventeen (17) and the North West Quarter of the South West Quarter of Section Seventeen (17), all in Mapleton Township, Minnehaha County, South Dakota, all of which lands will be affected by the drainage herein proposed;

Your petitioners further represent that it is necessary for the drainage of agricultural lands in said Big Sioux Valley from a point about four miles north of the south line of Sverdrup Township to a point about one and one-half miles north of the south line of Mapleton Township, that the proposed drainage be established;

Your petitioners further represent that the establishment of such drain will be conducive to the general health, convenience and welfare of the inhabitants of said territory, and that the establishment of such drainage will prevent the frequent loss of many thousands of acres of crops and meadow in the valley and will prevent great damage to the buildings and their contents, and will prevent great damages to the highways in said territory, and also to the railroad tracks and the rights of way of the Chicago, Milwaukee and St. Paul Railway Company in said territory, and will prevent damages and destruction of many bridges and their approaches in said territory;

220 Your petitioners further represent that the general purpose of said proposed drainage is, among other things, to prevent the annual or occasional flooding of land in said territory caused by high water in said river by providing a drain to carry off all of the water of said river above its normal stage from about the point where it overflows its banks; that such drainage can be accomplished by establishing a drain from an initial point near the place where said river crosses the south line of Section Five (5) of Mapleton Township, and running thence southeasterly adjacent to the right of way of the Madison line of the Chicago, Mil-

waukee and St. Paul Railway Company to the west line of the East Half of the North East Quarter of Section Eight (8) in Mapleton Township, running thence south about three miles to a point about forty (40) rods south of the north line of Section Twenty Nine (29) in Mapleton Township where the said line intersects Silver Creek, running thence southeasterly to the upper end of Drainage Ditch No. 1, as established by said Board;

Your petitioners further represent that, as a part of said plan of drainage, there should be constructed a dike along the south and southeasterly side of said Big Sioux River where the same flows through the North East Quarter of Section Thirty-two (32) in Sverdrup Township, such dike to be of the length of thirty (30) or [forth] (40) rods.

Your petitioners further represent that the territory likely to be affected thereby embraces Sections Sixteen (16), Seventeen (17), Eighteen (18), Twenty (20), Twenty-one (21), Twenty seven (27), Twenty Eight (28), Twenty Nine (29), Thirty-Two (32), Thirty Three (33) and Thirty Four (34) in Sverdrup Township, and Sections Three (3), Four (4) Five (5), Eight (8), Nine (9), Sixteen (16), Seventeen (17), Nineteen (19), Twenty (20), Twenty One (21), Twenty Eight (28), and Twenty Nine (29) in Mapleton Township.

221 Dated April 9, 1908.

IVER R. PETERSON
IVER I. NELSON
BERNT MEKVOLD
W. O. QUINCY

Petitioners.

Filed in the office of the Auditor of Minnehaha County, S. D., this 10th day of April, 1908.

C. E. HILL

County Auditor

Plaintiff offered in evidence page 113 of Ditch Record A, as follows:

January 8, 1909.

Further Petition.

To the Honorable Board of County Commissioners, of Minnehaha County, South Dakota:

The undersigned land owners in the valley north of Sioux Falls respectfully request, pursuant to the trip of inspection made by you on December 15, 1908, that in acting upon the petition of Iver R. Peterson and others for a drainage ditch in Mapleton Township you will cause the proposed drainage ditch to be extended further north and made a part of Ditch No. 1, also that as a part of said proposed drainage system, you will cause a ditch to be established on the west side of the Big Sioux River from a point above the Baltie dam southerly to a suitable place on the river in Section Eighteen (18) in Sverdrup Township, and that you will by a proper outlet on the east side of the river, provide for the taking care of the surplus water so dumped into the river at that point.

A. L. Berg	Oluf Lyng
Ole J. Ustrud	Mrs. Mary Lee
G. T. Gunderson	Mrs. Anne Larson by Agt.
O. G. Brende	K. Larson
John A. Aasen	H. G. Solem
222 P. M. Thompson	T. A. Berven
Ole O. Langness	E. O. Fossum
J. H. Williamson	John P. Rievold
Gunerius Thompson	

Filed in the office of the Auditor of Minnehaha County, S. D., this 8th day of January 1909.

C. E. HILL County Auditor.

Plaintiff offered in evidence pages 121 to 123 inclusive of Ditch Record A, as follows:

Resolution for Adjourned Hearing:

(Transcribed from Commissioners Record No. 6, Page 170-1-2-3)

On motion the following resolution was unanimously adopted:

Resolution:

Whereas, on April 10, 1908, Iver R. Peterson and others filed their petition with the County Auditor of Minnehaha County, South Dakota, for the establishment and construction of a certain drainage ditch in Mapleton Township in said County; and

Whereas, this Board did on June 12, 1908, adopt a resolution for the survey thereof; and

Whereas, Mr. S. B. Howe, County Surveyor, employed by this Board for making such survey, did on November 13, 1908, file his report thereof, together with maps and profiles, and

Whereas, this Board did on said last named date fix Friday, December 4, 1908, at the office of the County Auditor of said County as the time and place for the hearing of said petition, and did cause notice of said hearing to be given publication and posting, as required by law; and

223 Whereas, December 4, 1908, a petition was presented by A. L. Berg, and others for the extension of said ditch; and

Whereas, said matter has by successive adjournments been continued until April 9, 1909; and

Whereas, said engineer did on April 8, 1909 present his supplemental report of survey and plans and profiles; and

Whereas, this Board has inspected the route of said drainage ditch as described in said petition and as hereinafter described; and

Whereas, this Board deems it practicable, necessary and best that the route of said drainage ditch be varied from the route described in said petition and its northerly terminal points be materially changed; therefore

Be [is] Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the line of said drainage ditch be and it is hereby changed from the route described in said petition to run as follows: the same being substantially as petitioned for up to the point where the same crosses the Madison branch of the Chicago, Milwaukee and St. Paul Railway Company, viz:

First Section.

Commencing at a point ten hundred forty-five (1045) feet north and fifty-eight (58) feet west of the Southeast corner of Section twenty-nine (29) in Township One Hundred and Two (102) North, Range Forty-nine (49); running thence north five hundred forty seven (547) feet; thence north 23° west thirty three hundred eighteen (3318) feet to a point fifty eight (58) feet west of the quarter quarter line in the North East Quarter (NE $\frac{1}{4}$) of Section Twenty Nine (29), in said Township; thence north parallel with, and fifty-eight (58) feet west of said quarter quarter line through Section

224 Twenty Nine (29), Twenty (20), Seventeen (17), and a part of Section Eight (8) Twelve thousand nine hundred thirty five (12935) feet; thence north 50° East twenty seven hundred thirty two (2732) feet to a point thirty three (33) feet west of the west line of the right of way of the Chicago, Milwaukee and St. Paul Railway Company in the North West Quarter of Section Nine (9) in said Township; thence northerly parallel with and thirty three (33) feet west of the said right of way line nineteen thousand three hundred, sixty eight (19368) feet to a connection with a high water channel of the Big Sioux River in the South East Quarter of Section Twenty (20) in Township One Hundred and Three (103) North, Range Forty Nine (49).

Second Section:

Commencing at a point sixteen hundred and forty (1640) feet east of the center of Section Eighteen (18) in Township One Hundred and Three (103) North, Range Forty Nine (49); running thence north 33° west thirty one hundred and fifty five (3155) feet to a point sixty (60) feet west of the quarter corner between Sections Seven (7) and Eight (8) in said Township; thence north parallel with and sixty (60) feet west of the quarter line of Section Seven (7) and Six (6) in said Township, and in Section Thirty One (31) in Township One Hundred and Four (104) North, Range Forty Nine (49) to the center line running East and West through said Section Thirty One (31); thence northeasterly to the creek near the northeast corner of said Section Thirty One (31), the said line being the center line of said proposed drainage ditch; that the width of said drainage ditch be and it is hereby fixed at forty (40) feet at the bottom thereof with a side slope of one and one-half feet to one; and that the fall of said

225 proposed drainage ditch be three (3) feet per mile from north to south, and that the area required for right of way and dump space will be four (4) rods on each side of said line, except where it is adjacent to the right of way of the Chicago, Milwaukee and St. Paul Railway Company, and that the area required for right of way and dump space where said proposed line runs adjacent to the right of way of said Railway Company shall be two (2) rods on the easterly side of said line and six (6) rods on the westerly side of said line;

That in addition thereto the Big Sioux River be straightened in Section Seventeen (17), Eighteen (18) and Twenty (20) in Township One Hundred Three (103) North, Range Forty Nine (49) in order to afford better means of communication between the lower end of Section Two (2) of said ditch and the upper end of Section One thereof;

Be It Further Resolved that this hearing be and it is hereby adjourned until Thursday May 6, 1909, at two o'clock P. M. at the office of the County Auditor of said County, and that notice thereof be given in accordance with the provisions of Chapter 134 of the Laws of 1907 of the State of South Dakota, as amended by the Laws of 1909, the same to be signed by the Chairman of this Board and attested by the County Auditor by publishing the same once in each week for two consecutive weeks in the Sioux Falls Daily Argus-Leader, and by posting copies of said notice in at least three public places near the route of said proposed drainage ditch as varied and extended, such posting to be made at least two weeks prior to the time of said hearing.

Adopted April 9, 1909.

THE BOARD OF COUNTY
COMMISSIONERS MINNEHAHA
COUNTY, SOUTH DAKOTA.
By Thos. McKinnon, Chairman.

226 Plaintiff offered in evidence pages 135 to 136 of Ditch Record A, as follows:

Resolution Establishing Drainage Ditch No. 2:

The matter of the petition of Iver R. Peterson and others for the establishment of a drainage ditch, filed in the office of the County Auditor of Minnehaha County, South Dakota, on April 10, 1908, coming on to be heard by the Board of County Commissioners of said County at a regularly adjourned meeting on Thursday May 6, 1909, pursuant to notice heretofore given, and said Board having heard and considered said petition and all matters in support of the same and in opposition thereto; Now therefore

Be It Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the said drainage ditch as extended and varied and as described and set forth in the resolution adopted by this Board on April 9, 1909, is conducive to the public health, conveyance and welfare and is necessary and practicable for draining agricultural lands, and it is so found;

Be it Further Resolved that the said drainage ditch as described and set forth in the said resolution of April 9, 1909, be and it is hereby named and designated "Drainage Ditch No. 2".

Be it Further Resolved that the said Drainage Ditch No. 2 be and the same is hereby established;

Be it Further Resolved that in the construction of said drainage ditch the rights of flowage of Wm. G. Milne, the owner of the mill at or near Baltic, S. D., will not in any way be diminished or interfered with and the engineer is hereby directed to so establish the level of the bottom of said drainage ditch, where the same joins with the creek near the north-east corner of Section Thirty One (31) in Dell Rapids Township that it will not diminish or interfere with such rights of

flowage and that a head gate or other protection will be
227 established if necessary, to prevent the waters of the Big Sioux River from flowing into said ditch at a point lower than the maximum height of such rights of flowage;

Be it Further Resolved that this Board proceed to assess the damages sustained by each tract of land or other property through which the same shall pass and damages as compensation for the land taken for the route of such drainage and that the same be made a special order for Friday May 7, 1909, at nine o'clock A. M.,

On motion, the Board adjourned to May 7, 1909 at 9 o'clock A. M.

Plaintiff offered in evidence pages 48 to 60 inclusive of Ditch Record B, as follows:

October 7, 1910.

The Board having had under consideration for several days the matter of the preliminary Assessment of Proportion of Benefits which was being prepared by J. H. Gates, Attorney with the assistance of Engineer Wagner and the same being completed, on motion the following resolution was adopted:

**Resolution Fixing Proportion of Benefits
Drainage Ditch No. 2.**

Whereas the Board of County Commissioners of Minnehaha County, South Dakota, has established the Drainage Ditch No. 2, and has fixed the damages arising therefrom and has been investigating and considering the proportion of benefits that will accrue to the lands, tracts and lots within the drainage area of said drainage ditch; and

Whereas in arriving at this determination of the proportion of benefits it has considered not only the benefits which will

228 accrue directly by virtue of the construction of said drainage ditch, but also the indirect benefits by virtue of such drainage being an outlet for connecting drains that may hereafter be constructed; and

Whereas said Board is of the opinion that the drainage area of Drainage Ditch No. 1 is benefitted by the establishment and construction of Drainage Ditch No. 2, and that both of said drainage ditches are mutually interdependent, and should virtually be considered as one drainage system; and

Whereas in the determination of the proportion of benefits herein fixed and determined upon the several premises embraced within the drainage area of Drainage Ditch No. 1 the proportion of benefits as finally fixed and equalized in the matter of said Drainage Ditch No. 1 have been taken into consideration; and

Whereas the number of acres set opposite each tract hereinafter described represent the actual number of acres of land within said tract that are benefitted, and excluding therefrom lands taken by said drainage ditch, and excluding also lands embraced within laid out highways, and in fixing the proportion of benefits to platted lots along said drainage ditch the area therefor taken by the drainage is excluded; and

Whereas in the use of the word "tract" in said list of descriptions reference is had to the tract as it appears upon the plat in the County Auditor's Subdivision of the particular quarter section in which the land is located, on file in the Register of Deeds' office of said County, and in the description of lands herein by reference to books and pages of deed records such references are to the deed records in the office of said Register of Deeds; and

229 Whereas, in the consideration of such proportion of benefits said board has assumed that the Southeast Quarter of the Northeast Quarter of the Northeast Quarter of Section Twenty, in Township One Hundred Three North, Range Forty-nine, West Fifth P. M., owned by Martha R. Roberts, and containing ten acres, be benefitted "One", and taking said tract as a unit;

Therefore, Be it Resolved that the benefits to the following described lands, tracts and lots; the benefits to the City of Sioux Falls, the benefits to the Townships of Sioux Falls, Wayne, Mapleton, Sverdrup and Dell Rapids, the benefits to the County of Minnehaha; and the benefits to the several railroad companies hereinafter described, arising and accruing

by the establishment and construction of Drainage Ditch No. 2, be, and they are hereby fixed and determined in the following proportions, viz:

Name of Owner	Description	Sec-	Town-	Range	Acres	Pro-
		tion	ship			por-
						tion
E. S. Carter and S. C. Carter	W $\frac{1}{2}$ of NE $\frac{1}{4}$	4	101	49	.57	.570
David Frank	E $\frac{1}{2}$ of NE $\frac{1}{4}$ of NW $\frac{1}{4}$	4	101	49	19.50	.244
M. H. Rylatt	W $\frac{1}{2}$ of NE $\frac{1}{4}$ of NW $\frac{1}{4}$ 4 (except right of way of C. M. & St. P. Ry. Co.)	4	101	49	19.50	.244

230 Here follows some twenty-six pages of similar assessments of individual owners of land, describing lands in the following Sections, Townships and Ranges:

Section	Township	Range
4	101	49
5	"	"
6	"	"
7	"	"
8	"	"
9	"	"
17	"	"
18	"	"
19	"	"
30	"	"
31	"	"
13	"	50
24	"	"
25	"	"

Section	Township	Range
3	102	49
4	"	"
5	"	"
8	"	"
9	"	"
16	"	"
17	"	"
20	"	"
21	"	"
28	"	"
29	"	"

31	,	"	"
32		"	"
33		"	"
5		103	"
6		"	"
7		"	"
8		"	"
9		"	"
16		"	"
17		"	"
18		"	"
20		"	"
21		"	"
27		"	"
28		"	"
29		"	"
32		"	"
33		"	"
34		"	"
29		104	"
31		"	"
32		"	"

Also all lots in the following additions to the Town of Renner:

231 Town of Renner

Olson's Addition to Renner.

And also lots in the following additions to the City of Sioux Falls:

Berwick	Addition
Brookings	"
Brooks	"
Bunkers	"
Central Park	Addition
Englewood	"
Harrison	"
Lakeview	"
Lincoln Park	"
McClellans	2nd
Meredith's	1st
Meredith's	2nd
Millard Park	"
N. Boulevard	"
N. Park	"
N. Park	2nd

Sioux Falls Improvement Company Addition

Summit Addition

West Lawn "

West Park "

Also the following railroads, cities and townships:

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Name	Description	Acres	Proportion of Benefits
City of Sioux Falls	One and one eighth miles of highways and dedicated streets within the drainage area.....		.090
Sioux Falls Township	Two and one-half miles of laid out and established highways within the drainage area320
Wayne Township	Three quarters of a mile of laid out and established highways within the drainage area060
Mapleton Township	Twelve miles and 52 rods of laid out and established highways within the drainage area		8.723
Sverdrup Township	Fifteen and seven-eighths miles of laid out and established highways within the drainage area		17.710
Dell Rapids Township	One and three-eights miles of laid out and established highways within the drainage area		1.936
Minnehaha County	Benefits arising from the safety to and preservation of bridges within the drainage area		9.100

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Name	Description	Acres	Proportion of Benefits
Chicago, St. Paul, Minneapolis & Omaha R. R. Co.	Right-of-way as laid out and located across Section 18, Township 101, Range 49, and Section 13, Township 101, Range 50, West 5th P. M., within the drainage area (1.5 miles)	18	20.320
South Dakota Central Railway Co.	Right-of-way as laid out and located across Sections 4, 5 and 9, Township 101, Range 49, and Sections 29 and 32, Township 102, Range 49 West; 5th p. m. within the drainage area (2 6 miles)	20.80	59.980
Chicago, Milwaukee & St. Paul	Right-of-way as laid out and located across Sections 4 and 9, Township 101, Range 19,		

Railway Co.	and Sections 4, 9, 16, 21, 28, and 33, Township 102, Range 49, and Sections 5, 8, 17, 20, 28, 29 and 33, Township 103, Range 49, and Section 32, Township 104, Range 49 West, 5th p. m. within the drainage area (the above being the Sioux Falls and Egan line); also across Sections 5, 8, and 9, Township 102, Range 49 West, 5th P. M., within the drainage area (being the Ren- ner and Madison line) Total 14.5 miles	167.06	383.130
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Be it Further Resolved that Thursday, the 3rd day of November, 1910, at two o'clock P. M. at the office of the County Auditor of said County be, and it is hereby fixed as the time and place for the equalizing of said proportion of benefits, and that notice thereof be given in accordance with the provisions of Chapter 134 of the Laws of 1907 of the State of South Dakota, as amended by Chapter 102 of the Laws of 1909 of said State, such notice to be signed by the Chairman of this Board and attested by the County Auditor, by publication in the Sioux Falls Daily Argus Leader once in each week for two consecutive weeks, and by posting copies of said notice in at least three (3) public places near the route of said drainage ditch, said posting and the last publication of said notice to be made at least ten (10) days prior to the time of said hearing.

Adopted October 7th, 1910.

THOMAS McKINNON, Chairman.

Attest:

(Seal) Henry Howe, County Auditor.

Filed in the office of the Auditor of Minnehaha County, S. D. this 7th day of October 1910.

HENRY HOWE, County Auditor.

That in the foregoing assessment of benefits the Chicago, Rock Island & Pacific Railway, and no property belonging to the said railway, was in any way described or assessed.

235 Plaintiff offered in evidence pages 61 to 71 inclusive, of Ditch Record "B", being a record of the notice of hearing on the questioning of equalization of benefits of Ditch No. 2. This notice of hearing named the same persons and

the same property specified in the resolution of the County Commissioners fixing the proportion of benefits of Ditch No. 2.

Plaintiff offered in evidence pages 153 to 165 inclusive, of Ditch Record "B", the same being the record of the assessment made by the County Commissioners for Drainage Ditch No. 2. This assessment named the same persons and the same property specified in the resolution fixing the proportion of benefits of Drainage Ditch No. 2 and the assessment was made as provided for in said resolution. This record shows that the commissioners ascertained and determined the entire cost of Drainage Ditch No. 2 to be the sum of \$81,106.19.

The foregoing exhibits with reference to Drainage Ditch No. 1 and Drainage Ditch No. 2 were received in evidence.

It is stipulated that filed herein as a part of the answer of the defendants are correct copies of the following records of the Board of Commissioners of Minnehaha County, with reference to Drainage Ditch No. 1 and 2, to-wit: the petition of F. L. Blackman and others, upon which the proceedings with reference to Drainage Ditch No. 1 and 2 are alleged to have been had, the order for filing said petition, the resolution for survey under said petition, the resolution fixing line and width of the ditch and time and place for hearing the petition of F. L. Blackman and others, the published notice of hearing petition, (such notice not being attached to the answer, but having been filed after the filing of the answer with a stipulation that it might be considered as a part of the answer), and resolution establishing Drainage Ditch 236 Ditch No. 1 and 2. Said exhibits were offered in evidence by plaintiff and received in evidence.

(The foregoing exhibits relating to Drainage Ditch No. 1 and 2 are printed herein as a portion of the answer of the defendants and are consequently not herewith reprinted.)

Plaintiff's exhibit "A" was identified by the witness F. E. Ward as one of the records of the office of the County Auditor of Minnehaha County, and was offered in evidence by plaintiff.

To the offer in evidence of plaintiff's exhibit "A" the defendants and intervening defendants objected as incompetent, irrelevant and immaterial to any issue in the case, the same not being pleaded in plaintiff's bill of complaint and a part of their case. For the further reason that the appor-

tionment made and set forth in plaintiff's bill of complaint affirmatively appears to be an apportionment made during the year 1921. Plaintiff's exhibit "A" was received in evidence subject to objection.

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Drainage Notice.

To Whom It May Concern:

Notice is hereby given that Tuesday, April 25th, 1919, at Two o'clock P. M., at the office of the County Auditor of Minnehaha County, South Dakota, at the Court House in the City of Sioux Falls, in said County, have been fixed by the Board of County Commissioners of said County as the time and place for equalizing the proportion of benefits to the several lands, tracts, lots, roads, streets and railroad rights of way embraced within the district of Drainage Ditch No. 1 and 2, and benefitted by the construction of said Drainage Ditch, and that the route of said Drainage Ditch No. 1 and 2 is as follows:

Section One.

Commencing at a point fifty-eight (58) feet west and ten hundred and thirty-five (1035) feet north of the southeast corner of Section twenty-nine (29) Township One Hundred Two (102), Range Forty-nine (49), West of the 5th P. M., running thence south parallel to the adjacent highway two thousand and eighty-five (2085) feet to station one hundred and fourteen (114); also commencing at a point Six hundred and seventy-four (674) feet north, and about thirty-five (35) degrees west of said station number one hundred and fourteen (114) thence southeasterly six hundred and seventy-four (674) feet to said station number one hundred and fourteen (114), thence south and [parallel] to said highway seventy-seven hundred (7700) feet to station number thirty-seven (37), thence south forty-five (45) degrees, east three thousand seven hundred (3700) feet to Station number zero (0), the same being on high water line, thence south fifty-nine (59) degrees and thirty-six (36) minutes, east four hundred and fifty (450) feet, thence south thirty-one (31) degrees, east to Big Sioux River, the said line being the center line of said

drainage ditch, and is intended to sever the exact location of drainage ditch Number 1 as now established and constructed.

Section Two.

Commencing at a point ten hundred and thirty-five (1035) feet north and fifty-eight (58) feet west of the southeast corner of Section twenty-nine (29), in Township One Hundred and Two (102), Range Forty-nine (49), the same being the commencement point of Section 1, hereinbefore described, running thence north five hundred and forty-seven (547) feet, thence north twenty-three (23) degrees, west Thirty-three hundred and eighteen (3318) feet to a point fifty-eight (58) feet west of the quarter quarter line in the Northeast Quarter of Section Twenty-nine (29), in said Township, thence north parallel with and fifty-eight (58) feet west of said quarter quarter line through Sections Twenty-nine (29), Twenty (20), Seventeen (17), and a part of Section Eight (8), Twelve thousand nine hundred and thirty-five (12,935) feet, thence north fifty (50) degrees east, twenty-seven hundred and thirty-two (2732) feet to a point thirty-three (33) feet west of the west lines of the right of way of the Chicago, Milwaukee & St. Paul Railway Co., in the Northwest Quarter of Section Nine (9), in said Township, thence northerly parallel with and thirty-three (33) feet west of said right of way line nineteen thousand three hundred and sixty-eight (19,368) feet to a connection with the high water channel of the Big Sioux River, in the southeast Quarter of Section Twenty (20), in Township One Hundred and Three (103), north of Range Forty-nine (49).

Section Three.

Commencing at a point sixteen hundred and forty (1640) feet east of the center of Section Eighteen (18), in Township One Hundred and Three (103), Range Forty-nine (49);
running thence north thirty-three (33) degrees west
239 thirty-one hundred fifty-five (3155) feet to a point
sixty (60) feet west of the quarter corner between
Sections Seven (7) and Eight (8), in said Township; thence
north parallel with and sixty (60) feet west of the quarter line
in Section Seven (7) and Six (6) in said Township, and in
Section Thirty-one (31), in Township One Hundred and Four
(104), North of Range Forty-nine (49), to the center line
running east and west through said Section Thirty-one (31);
thence northeasterly to the creek near the northeast corner of
said Section Thirty-one (31), the said line being the center
line of said proposed drainage.

That in addition thereto the Big Sioux River has been or is being straightened and the channel changes made as fol-

lows: Channel changes on Sections Five (5) and Seven (7), Township One Hundred and One (101), Range Forty-nine (49); Channel changes on Section Thirty-two (32), Twenty-nine (29), Twenty (20), Eighteen (18), Seventeen (17), Eight (8) and Five (5), Township One Hundred and Two (102), Range Forty-nine (49); and Channel changes on Sections Thirty-two (32), and Twenty-nine (29), Township One Hundred and three (103), Range Forty-nine (49); the same being in accordance with the lines of said Drainage Ditch as actually constructed and for which the said Board of County Commissioners has heretofore assessed condemnation damages; that maps and profiles of said Drainage Ditch are now on file in the office of the County Auditor of said County, to which reference is hereby made.

That there have been included within the drainage area of Drainage Ditch 1 and 2 the entire drainage area of Drainage Ditches No. 1 and No. 2 heretofore established and constructed, and additional territory contiguous thereto, which is benefitted by the establishment and construction of said

Drainage Ditch No. 1 and 2, and that in the judgment
240 of said Board of County Commissioners all of said territory is interdependent, and is considered as one drainage system, that in the determination of the proportion of benefits fixed upon the lands and premises embraced within said drainage area, the amounts of the assessments heretofore made in the matter of Drainage Ditch No. 1 and Drainage Ditch No. 2 have been taken into consideration.

That in the consideration and assessment of benefits, as hereinafter set forth, the said Board of County Commissioners have assumed that the Southeast Quarter of the Northeast Quarter of the Northeast Quarter of Section 20, in Township 103, Range 49, West of the 5th P. M., owned by Martha R. Roberts, and containing ten acres, is benefitted "one"; also that Lot 1, in Block 22 of J. L. Phillips' Addition, owned by G. Keriakedes, containing a single lot, is benefitted "one", and that County Auditor's Tract 14 of the Southwest Quarter of Section 16, Township 101, Range 49, except the east 132 feet thereof, owned by Albert Larson and George E. Larson, is benefitted "one", and taking the said lands, tracts and Lots as a unit, the proportion of benefits to each and all of the lands, tracts, lots, roads, streets and railroad rights of way and the description of each tract of land affected by said drainage, and the names of the owners

thereof as they appear from the records in the office of the Register of Deeds of Minnehaha County, South Dakota, at the date of said petition and at the date of filing said petition, was fixed as follows:

241								Proportion of Benefit.
Name of Owner	Description	Sec.	Twp.	R.	Acres			
Fred Nelson	W $\frac{1}{4}$ of NE $\frac{1}{4}$	4	101	49	57.00	6.897		
State of South Dakota	E $\frac{1}{2}$ of NE $\frac{1}{4}$ of NW $\frac{1}{4}$	4	101	49	19.5	2.952		
State of South Dakota	W $\frac{1}{2}$ of NE $\frac{1}{4}$ of NW $\frac{1}{4}$	4	101	49	19.5	2.952		

Here follows some forty-nine pages of similar assessments of individual owners of land, describing lands in the following Sections, Townships and Ranges:

Section	Township	Range
4	101	49
5	"	"
6	"	"
7	"	"
8	"	"
9	"	"
17	"	"
18	"	"
19	"	"
30	"	"
13	"	50
24	"	"
3	102	49
4	"	"
5	"	"
8	"	"
9	"	"
16	"	"
17	"	"
19	"	"
20	"	"
21	"	"
28	"	"
29	"	"
31	"	"
32	"	"
33	"	"
5	103	"

	6	"	"
	7	"	"
	8	"	"
	9	"	"
	16	"	"
	17	"	"
	18	"	"
	20	"	"
	21	"	"
	27	"	"
	28	"	"
	29	"	"
	32	"	"
	33	"	"
	34	"	"
	29	104	"
	31	"	"
	32	"	"
242	Section	Township	Range
	24	101	50
	25	"	"
	36	"	"
	31	"	49
	32	"	"
	33	101	49
	34	"	"
	27	"	"
	22	"	"

Also city lots in the following additions to the Town of Renner:

Town of Renner

Olson's Addition to Renner.

Also lots in the following additions to the City of Sioux Falls:

Berwicks'	Addition
Brookings	"
Brooks	"
Bunkers	"
Central Park	"
Englewood	"
Harrison's	"
Lincoln Park	"
McClelland's	"

- Meredith's 1st "
Meredith's 2nd "
Millard Park "
N. Boulevard "
North Park "
North Park 2nd "
Sioux Falls Improvement Company's Addition
Summit Addition
West Park "
J. L. Phillips' Addition
- Burlington's Subdivision of Block 26 of J. L. Phillips' Ad-
dition
- Morningside Addition
- Gale's Addition to Sioux Falls
- Chicago, Rock Island & Pacific Railway Co. Lots 1, 2,
3, 4, 5, and 6 Block 24, proportion of benefits 0.550
- Morse's Addition
- Millspaugh's Addition
- Chicago, Rock Island & Pacific Railway Co., Lots 1
and 2, Block 13, proportion of benefits 0.137
- Daniel's Addition
Van Eps "
- Brookings & Edmunds' Addition
- Braley's Addition
- Silver Park Addition
- Unplatted lots in Sections 16, 21 and 22, Township 101, Range
49, within the City of Sioux Falls.
- 243 Equitable Realty Company's subdivision of NE $\frac{1}{4}$ of
NW $\frac{1}{4}$ of Section 16.
- Chicago, Rock Island & Pacific Ry Co. Tract 29 of
SW $\frac{1}{4}$ of Section 16, proportion of benefits 3.437.
- Chicago, Rock Island & Pacific Ry Co. Tracts 1 and 2
of SW $\frac{1}{4}$ of Section 16, proportion of benefits 3.437.
- Chicago, Rock Island & Pacific Ry. Co. Lots A and B,
subdivision, Tract 17, SW $\frac{1}{4}$ of 16, proportion of bene-
fits 0.480

Then followed the following assessments on cities, townships and railways:

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Name of Owner	Description	Proportion of Benefit.
City of Sioux Falls	Parks, Water System, Highways and dedicated streets within the drainage area.	111.11
Sioux Falls Township	Two and one-half miles of laid out and established highways within the drainage area.	0.384
Wayne Township	Three quarters of a mile of laid out and established highways within the drainage area.	0.072
Mapleton Township	Twelve miles and fifty-two rods of laid out and established highways within the drainage area.	10.468
Sverdrup Township	Fifteen and seven-eighths miles of laid out and established highways within the drainage area.	21.252
Dell Rapids Township	One and three-eighths miles of laid out and established highways within the drainage area.	2.323
Minnehaha County	Benefits arising from and to the safety and preservation of bridges within the drainage area.	25.555
Chicago, St. Paul, Minneapolis & Omaha Ry. Co.	Right-of-way as laid out and located across Section 18, Township 101, Range 49, and Section 13, Township 101, Range 50 West of the 5th P. M., within the drainage area (1.5 miles)	15.263
Watertown & Sioux Falls Ry. Co.	Right-of-way as laid out and located across Sections 4, 5, and 9, Township 101, Range 49, and Sections 29 and 32, Township 102, Range 49, West of the 5th P. M., within the drainage area (2.80 miles),	28.86
Chicago, Milwaukee & St. Paul Ry. Co.	Right-of-way as laid and located across Sections 4 and 9, Township 101, Range 49, and Sections 4, 9, 16, 21, 28, and 33, Township 102, Range 49, and Sections 5, 8, 17, 20, 28, 29, and 33, Township 103, Range 49, and Section 32, Township 104, Range 49,	

West of the 5th P. M., within the drainage area, (the above being the Sioux Falls and Egan line), also across Sections 5, 8 and 9, Township 103, Range 49, West of the 5th P. M., within the drainage area, (being the Renner and Madison line), total 14.5 miles

147.533

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All such owners and all persons interested are hereby notified and summoned to show cause at the time and place aforesaid why the proportion of benefits shall not be fixed, as stated, and the said determination of said Board made final.

Dated March 8, 1919.

A. G. RISTY
Chairman of the Board of County Commissioners of Minnehaha County, South Dakota.

Attest:

E. H. Shenkle
County Auditor
(Seal)

Filed in the office of the Auditor of Minnehaha County, S. D. this 8 day of March, 1919.

E. H. SHENKE
County Auditor.

That the only place in which the Chicago, Rock Island & Pacific Railway Company is in any way mentioned in the foregoing notice is as owner of the lots as above set forth therein.

246 It is stipulated that attached to the bill of complaint herein is a true copy of the drainage ditch notice of hearing upon the question of equalization of apportionment of benefits of Drainage Ditch No. 1 and 2 on the 1st day of August, 1921, caused to be published by the Board of County Commissioners of Minnehaha County, South Dakota, said Drainage Ditch Notice being Marked "Exhibit C".

Exhibit "C" attached to the bill of complaint is offered in evidence by plaintiff and received in evidence.

(Exhibit "C" being printed herein as an exhibit to the bill of complaint, is not at this place reprinted.)

(Cross-Examination of witness F. E. Ward)

The proportion of benefits of Drainage Ditch No. 1 and 2 was not equalized upon the notice returnable April 25th, 1919, upon that date or at any other time. The proceeding was abandoned on account of errors in the published notice.

A. G. RISTY called and sworn as a witness for the plaintiff testified as follows:

(Direct Examination)

My name is A. G. Risty; I am one of the defendants in this action and am and for nine years have been a member of the Board of County Commissioners of Minnehaha County, South Dakota; for about seven years I have been Chairman of the Board; in the spring of 1919 the County Commissioners passed a resolution apportioning the benefits for Drainage [Ditch] No. 1 and 2; notice of hearing upon the proposed equalization of such benefits was published; the plaintiff's "Exhibit "A" is the notice I refer to; I was a member of the Board at the time of making that apportionment of benefits.

247 Q. Please state to the Court, Mr. Risty, in what manner and upon what basis you determined, in the resolution referred to, the proportion of benefits to the Chicago, Minneapolis, St. Paul & Omaha Railway?

Objected to by defendants as incompetent, irrelevant and immaterial, the record now showing that the exhibit referred to by counsel in his question, that the proceedings therein were abandoned and are not the proceedings upon which the present actions were instituted, or the present controversy before the court.

Counsel for plaintiff: I state to the Court this is offered solely for the purpose of showing to the court the attempted application by the County Commissioners of the law which we are questioning.

The evidence received subject to objection.

A. Well, in all those cases we tried to take into consideration the right of way, the value of the line as compared with adjacent lands and the benefits that might be derived from this drainage proposition as to the maintenance of the tract and the bridges and so on.

In determining the apportionment of benefits as stated in Exhibit "A" to the Chicago, St. Paul, Minneapolis & Omaha

Railway, 1.5 miles; to the Watertown & Sioux Falls Railway Company, 2.60 miles; and to the Chicago, Milwaukee & St. Paul Railway Company 14.5 miles; I don't think we computed on a mileage basis; we may have had that number of miles in mind, but we tried all the while to base it on a certain unit, as I remember it.

Q. Just how, Mr. Risty, did you compare the alleged benefits to the three railway companies mentioned, with the 248 unit of agricultural lands to which you have just referred?

A. How we determined the units for the railroads?

Q. How you compared the alleged benefit to the railroads with the unit you have referred to.

A. Well, we arrived at—I don't remember what value we passed on that unit at that time (referring to the agricultural unit). We had the value fixed of the agricultural unit and the proportion of benefit that this drainage would be to that unit; when we came to the railroad question and other properties we took into consideration the benefits that they would derive and I might say we capitalized that—how much the average annual benefit would be to those properties, we might say to a certain piece of railroad, and having that amount fixed, we took the benefit that this unit of farm land was supposed to have and divided the benefits of the railroads—for instance we will say the unit of the farm land was \$100; we would make the proportion of the benefit 25% or \$20; then when we came to place a unit on other property after having exercised our judgment and made our investigation as to what those benefits might be, we arrived at a certain amount; we divided that by 25, the benefit of the farm unit and that gave us the number of units that we would assess up to that property or railroad, you might say if you wish; I am now testifying with reference to the procedure in 1919; we employed about the same procedure all the time.

Q. Mr. Risty, I call your attention to the fact that the units tentatively assessed to each railroad company in the drainage notice Exhibit "A" bears the same proportion to the mileage of said railway company in each case; with that in mind will you state to the court whether or not that attempted assessment was made by you upon a mileage basis?

A. The mileage basis—if it is the same number of 249 miles or if it is the same per mile for each company, then we must have estimated that the benefit was about the same and that gave the same number of units per mile.

In our attempted fixing of proportion of benefits which is in question in this lawsuit I don't think we used the mileage basis but I don't remember positively.

With reference to drainage Ditch No. 1 or reference to Ditch No. 1 and 2 no warrants to any great amount have been used since the time of fixing this proportion of benefits in the spring of 1919; it might possibly be that the cleaning of the ditch was not paid at that time; I don't remember that would be the kind of work that has been paid for since if it wasn't paid for before that; we have done some work around the foot of the spillway and so on since the publication of this notice in April, 1919, but I don't remember what it cost.

Q. In what manner, Mr. Ritsy, did you determine the benefit to the unit of agricultural land in 1919?

A. We made an estimate of what that land was worth according to our judgment and how much more it would be worth after it had the benefit of this drainage ditch, fair value, I don't remember we had any other basis to go on other than our own judgment as to the value of the land before the drainage and after the drainage.

We arrived at our determination with reference to the benefit of 111.11 units to the parks, water system, highways, and dedicated streets of the City of Sioux Falls without the drainage area in April, 1919, in just the same way as I stated

to you that we arrived at the benefit to the railroads
250 and so on; what in our judgment we thought was the
benefits; we fixed the amount that in our judgment we
thought was the benefit. We fixed an amount that in our
judgment we thought was right and proper and divided by
the benefit to the agricultural unit to get the number of units
in regard to this other property; we based that judgment
upon the fact that some of us, most of us, are farmers or were
farmers and we all know the price of land—was selling it
at that time; with reference to parks, water system, highways,
and streets of the City of Sioux Falls we based our deter-
mination upon the same facts as we used in regard to all
other property; we estimated according to our judgment and
our investigation what these properties had cost and what
benefit they were to the public, what loss they would be at
in case they were annually overflowed; to some extent we
used the cost of the parks of the City of Sioux Falls; the cost
of the water system of the City of Sioux Falls was talked
of; we made our determination on the estimate of the cost
and the benefit that those properties would derive; we never

had a hearing; it might be more and it might be less we didn't get far enough to hear the other side; we made an estimate of the damages that might accrue in case the highways and streets of Sioux Falls were overflowed; we based that estimate on our best judgment; suppose you have a building down along the Sioux here and have it overflow; the basement filled with water; your own estimate on what damage it would be to you and it would vary probably a great deal from mine, neither one might be right. It is doubtful whether you and I would agree; I have stated the manner in which we compared the benefits to the parks and water system, streets and highways of the City of Sioux Falls with the agricultural

unit; we took the public highway that would be annual,
251 ly overflowed; we had in mind as road builders what

damages that would be to that road; in our judgment we fixed the damages to be what we thought were right and the number of units on that piece of property; then we proceeded as in all other cases, divided by the benefit to our original unit; to get the number of units we first attempted to determine what the benefit was and then divided it to get the proportion; it is probably a fact that the unit as used by us in the measurements in the spring of 1919 represented approximately \$80.00 or \$85.00 in cost; we used at 10A. unit; I am not certain whether the unit was supposed to have been benefitted \$80.00 to \$85.00 or \$7.00 to \$8.00 per acre, that might be it, I don't remember.

Q. I now call your attention, Mr. Risty, to the drainage notice provided for hearing on the 1st day of August, 1921, upon the equalization of benefits of drainage ditch No. 1 and 2 and call your attention to the benefits to roads, railroads, etc. and ask you to state to the court in what manner and upon what basis you arrived at your determination with reference to the proportion of benefits to the Chicago, Rock Island & Pacific [Rr], the Chicago St. Paul, Minneapolis & Omaha Ry., the Great Northern Ry., the Chicago, Milwaukee & St. Paul Ry., the City of Sioux Falls, and the Northern States Power Co., referring particularly to the benefits to the Hydro-Electric plant and water rights of the Northern States Power Co.

Mr. Bartlett: "That is objected to as incompetent, irrelevant and immaterial, not within the issues that can be tried by this Court in this collateral action, the same being a legislative matter and not subject to inquiry in this Court, it not having been alleged in plaintiff's bill of complaint herein that

the Commissioners acted fraudulently or arbitrarily."

252 The Court: "Received, subject to objection."

A. As to the railroads and other property mentioned in this question we arrived in the manner stated before; we took into consideration the value of the right-of-way compared the right-of-way with adjacent lands and what protection from this water would benefit them and the savings it would be in upkeep of the railroad track, bridges, etc; in regard to the Hydro-Electric Co. plant we took into consideration the overflow and high water that would clog up their turbines and put them out of working order for some time, and we had in mind the great overflow of 1881 when it swept out the lumber yards down there and took out the mill at the foot of the falls, and in our estimation after having taken all those things into consideration which I wouldn't mention all now, we arrived at the conclusion that this water, the drainage proposition was of immense value to the water Power Co. and we figured on that with a good deal of care and then I think we arrived at the amount of \$50,000.00; I would not say positively that was the amount; we compared the benefits which we arrived at to the North States Power Co. with the benefit to our 1A tract of agricultural land as I have stated before; the benefit to that unit we had said was \$25.00; when we had estimated the benefits to the water power company was \$50,000.00 we wanted to find out how many units that it represented and we divided it by 25 and that gave us the number of units that would be assessable to the water power company; I suppose there was no material increase in value of the railroad companies' rights-of-way and other property I have mentioned by the making of these two apportionments of benefit unless it might be increase in

value with the value of other property increased at 253 that time, but the expenses to be paid were more;

there were probably in the neighborhood of \$250,000.00 of ditch warrants outstanding at the time we made this apportionment of benefits in 1919; I know there has been some issued since but I don't know how much; in estimating the benefits to various railroad companies in our last apportionment of benefits, we had about the same ideas as we did in 1919; we did not use the mileage basis or farm basis or street basis anywhere; we used the units.

Q. Just how did you use the units, that is what I am trying to find out?

A. When we find out what amount we have to raise—when we come to levy the assessment, the proportional benefits will be assessed to each unit—one unit may be 100%, an-

other is 150% and some only 10%, others 25%; they won't all be alike, of course they are not benefitted alike; in arriving at our determination in 1921 of the last apportionment of benefits and the number of units of the benefit to the Chicago, Rock Island & Pacific Rr. Co. we took into consideration the damages that might be done to the railroad tracks with high water to the grades; and in regard to the bridges, bridges could be built smaller; wooden bridges generally have a duration of about ten years and if they could get along with smaller bridges or make grades instead of tressel works which would be a benefit to the company; we inquired minutely into those things but as I say haven't heard the other side; we might be away off; the hearing was not allowed and we didn't get any basis from you folks on that question; we determined that the benefit to the track of the Rock Island Ry. from the ditch was a certain specified amount in dollars and cents; I wouldn't say that we put those amounts on record; that is the way we arrived at our units; we took into consideration in determining this benefit the fact that the Rock Island

254 might build a shorter bridge somewhere and that was part of the basis of our assessment of benefits after arriving at the amount of dollars and cents benefit we proportioned it by dividing by the value of the unit; in determining the proportion of benefits to the Chicago, St. Paul, Minneapolis, & Omaha, the Great Northern, the Chicago, Milwaukee & St. Paul Railroad Companies we followed the same procedure; the basis for our determination of the benefits with reference to the highways, streets, water supply, water plant, Sherman Park and Phillips Park in the City of Sioux Falls was as I have stated to you before; it may seem [arbitrarily] but in regard to county highways for instance, we knew pretty well what it would take to keep them in good passable condition in seasons when there was any overflow and in seasons when there was no overflow; in regard to the streets and basements that have been flooded each year I made an estimate as to how much it would damage a basement if filled with water; same way to the streets, same way to the parks; If you had ever had a hearing those things would all have been adjusted. I wouldn't say absolutely that we did in 1921 the same as we did in 1919 with reference to the city; we had the same idea in mind when we gave it reconsiderations and wherever we saw we could improve, we did it to make a more equitable proportion; in my judgment and in the judgment of the commissioners the last proposition is better than the first one; I don't want to say we absolutely followed the methods of the first instance or we followed any particular practice in the last

instance; it may be we did and possibly we didn't; in arriving at the determination that the benefit to the Hydro-Electric Co. plant of the Northern States Power Co. was about \$50,000.00, we based our determination upon the following facts; in the first place we have a stream that tends to give a steady flow of water around the bend so that it will not go over the spill-way. In one certain place about 3 miles northwest from 255 town outside of the ditch proper; the river broke through and would eventually have cut across the bottom and into the spillway and we dammed that up; then we took into consideration the high water backing up and filling up the gorge below their [plan] so that at certain times the water power would not be serviceable and that it would cost them fuel and other items to a great extent and then primarily, any water which overflowed would be apt to sweep out everything around that electric plant if they should have an overflow like 1881.

Q. You say there was danger of some ditch cutting through and diverting the water out of the river?

A. Yes sir.

Q. State whether or not that was the Ditch No. 1 or ditches Nos. 1 and 2 which were constructed by the Board of County Commissioners, the records of which have been placed in evidence here.

A. Those ditches were established and built before my time on the Board and that might possibly have been that it was cutting into Ditch No. 1 and making that immense excavation, but I would not say. But it was necessary to have it dammed up according to the orders of the hydro electric engineer; the ditch I refer to must have been probably the terminus of ditch No. 1; the engineer gave orders it had to be dammed up absolutely.

Q. In just what manner did you arrive at the fact that this alleged benefit to the Northern States Power Company amounted in dollars and cents to approximately \$50,000.00?

A. After taking those things into consideration, that was our best judgment. We might have itemized it and added it up; I don't remember that; but according to our best judgment that would be reasonable assessment upon the water power company.

We based that judgment upon the benefits I have stated 256 to you; giving them a uniform flow of water in dry seasons and protecting them from overflow when we had an overflow season; I have stated practically everything that was taken into consideration in determining that the Northern States Power Co. was benefitted \$50,000.00. if I remember right.

Q. I call your attention, Mr. Risty, to the alleged benefit in your apportionment of 1921 to the Chicago, Milwaukee & St. Paul Railway; benefits to right-of-way, tracks, embankments, bridges and grades across sections 4-9-16-21-22, Township 101 Range 49, and across sections 4-9-16-21-28 and 33 Township 102 Range 49, and across sections 5-8-17-20-28-29-33 in Township 103, Range 49, and ask you to tell the court what you took into consideration in determining that the Chicago, Milwaukee & St. Paul Ry. Co. was benefitted 1678.9 units.

A. We took into consideration what it would damage the tracks—what the damage would be if those tracks washed out and the expense to rebuild them, and with the assistance of a competent railroad engineer we arrived at those figures that we have given there.

We assumed that except for this spillway these tracks of the Chicago, Milwaukee & St. Paul Railway would wash out and be under water for a certain period; I have seen the Milwaukee road under water 8 or 10 days at a time when they had to run their trains around to Pipestone on other railroads; I don't remember what proportion of its tracks we assumed would wash out; the distance used is about equal to the lands that overflow; those lands that overflowed and had the tracks on; of course it would overflow the tracks; I don't remember how many times we estimated that to be; we tried to figure it out and our engineer worked it out and that was the number of miles; the tracks were on land subject to overflow, that is what determined the distance; with reference to the bridges of the Chicago, Milwaukee & St. Paul Railway in arriving at this benefit—I don't remember whether there is any more

bridges on the Milwaukee; yes, there are two; we took
257 into consideration that by diverting the great volume
of water from the river into these ditches, their bridges
would be less subject to destruction by the ice gorges and by
high water and that they could be made smaller when they
come to build new ones because they would not have such
high waters; the water would be divided between the river and
the ditches; in arriving at that feature of the benefit in dollars
and cents, we figured out with our engineer what it would
cost to build and maintain bridges of the size they have now
and what it might cost to build them smaller and their relief
when they were subject to overflow and ice gorges; these were
the elements we had in mind.

After the filing of the Blackman petition in 1916 when it was decided that the spillway was to be repaired we employed engineers to go ahead and investigate that and it took about

a year and a half before all of the preliminaries were taken care of so that we went to actual excavation on the structure; we employed a competent engineer and he laid the plans and we let the contract to a contracting company here, they were to have a percentage for their work; they proceeded to sink that shaft and make the channel of the spilling basin; to put it all in shape that it is at the present time; on the river we straightened a number of bends, made cuts across bends and straightened out the river to facilitate the flow of the water; I think Ditch No. 2 was cleaned about as far as Renner; then the time arrived that the ditch warrants did not sell any longer and we had no means to complete the work; there always were control gates at the head of Ditch No. 2; we made no change at the head of Ditch No. 2 after the filing of the Blackman petition if you call the end of it up there near Balchie where the ditch begins; it crosses the river at one certain place up there and if you have reference to where this lower part is started, there we built a small dam of willows 258 and earth to keep the water from coming out of the ditch entirely and doing damage that way; the route of the ditch was left the same as the route of Ditch No. 1 and Ditch No. 2, the old ditches; no changes were made in the initial point or terminal points of either ditch.

(Cross-Examination).

Prior to the attempt to fix the proportion of benefits in 1919, no topographical survey was made or thorough investigation upon which to base the assessments or fix the benefit. In order to save money we thought the old survey would answer; in making the proportional benefits we took the old figures and old survey to avoid expense; we didn't get far enough to make any assessment on any particular tract of land; the Board abandoned that attempt to fix the proportion of benefits because of an error in adopting three units instead of one; after that time the Board caused a full topographical survey to be made by Chenoweth & Rettinghouse of this city and a thorough investigation of the benefits that would accrue to the various properties within the drainage area; Mr. Rettinghouse reported and explained to us the conditions which he found generally throughout the drainage area and the property that was benefitted in making that report he stated to us the various elements that he considered as benefits and submitted to us the facts upon which he based his conclusions; Mr. Rettinghouse as our engineer made the computation with reference to this apportionment of benefits and the plans and we talked it over and he was practically the one that planned

how it should be done; he did all the figuring and the computations; before we adopted the resolution of June 10, 1921, we had been fully advised as to the topographical situation and the elements that went into the fixing the proportion of benefits against each of the various pieces of property that we deemed to be benefitted; the board made a personal investi-

gation of all the property within the drainage area and
259 determined the benefits before we adopted this resolu-

tion; we selected as a unit an acre of land about three miles north of town in the district between the river and the ditch and visited that unit in company with Mr. Rettinghouse; we determined that in our judgment that unit was benefitted by the improvement 25%; in reaching that conclusion it seems to me we valued the unit without the drainage at \$100 and with the drainage at \$125.00; it being our judgment that the real benefit to that unit was the sum of \$25.00; after determining the value of this unit we proceeded to equalize and fix the proportion of benefits among the other property; the engineer accompanied us and had with him various figures and maps he had made showing these tracts, we referred to the map right along as we traveled; the Board proceeded to investigate the whole territory proposed to be assessed on this basis investigating first upon the east side of the river and then on the west side and then around the bend clear in through town; we looked over the railroad situation and other properties including the power plant, city streets, parks, and water system that in our judgment were affected; my judgment and the judgment of the board coincided almost entirely with the report of the engineer, Mr. Rettinghouse, with reference to these various proportions of benefit; after having made our investigation and having had the elements of benefit explained to us by the engineer. The board exercised its judgment and concluded that these properties were actually benefitted relatively or approximately as the engineer had reported them, we considered as a basis for making assessments on these various properties the acreage of the right-of-way within the drainage area; with reference to the Great Northern Railroad property, Mr. Rettinghouse gave us the facts as to the area within the various territories; he pointed out to us that certain bridges would be benefitted by

260 reason of it, that certain bridges might be shortened by reason of having the water by-passed through the ditch; all of these facts together with the betterment or saving in maintenance on the roadbed were considered by the Board in determining and fixing the proportion of benefit as against the Great Northern Railroad; in like manner the

engineer explained the amount of acreage of right of way of the Chicago, Rock Island & Pacific within the drainage area would be protected and benefitted the same as the adjacent farm lands; he pointed out that there was a certain length of its track that would be affected in having its maintenance cheapened by the drainage and that certain of its bridges might be shortened and were protected by reason of this drainage ditch by-passing the portion of the water that would come down the river; these amounts were all taken into consideration and passed upon by the Board in determining the amount of benefit our judgment indicated the Chicago, Rock Island & Pacific received; the Chicago, Milwaukee & St. Paul Railway extends almost the full length of this ditch and adjacent to it; in some places the track is right along the ditch and in other places it runs pretty close to the ditch all the way; it might possibly be 80 rods away where the ditch crosses the river at Renner; he explained the amount that this railroad benefitted upon the same proportion that the farm lands adjacent thereto; that the embankments, tracks and roadbeds were benfitted in the same manner by being made more substantial and requiring less upkeep; that there was a certain number of bridges that could be shortened and a certain bridge might be abandoned by reason of by-passing this water; these matters were all taken into consideration by the Board in determining the amount of benefit that we fixed against the railroad for its proportion and the amount of benefit was figured out by Mr. Rettinghouse for us in the manner in which I have testified on the basis of maintenance

261 and upkeep; the Chicago, Minneapolis & Omaha Railway extends directly across the project in two places and Mr. Rettinghouse explaind to us that its right of way would benefit the same as adjacent land and that its roadbed was benefitted by being more easily maintained; that there were a certain number of bridges over the Sioux River and adjacent thereto that were protected by the drainage; that a certain number of trestles might be shortened or abandoned and that by reason of these benefits the railroad company was actually benefitted a certain amount and it was in our judgment; we took all these matters into consideration and exercised our judgment in determining the amount to be fixed as against these various properties.

Mr. Rettinghouse, as our adviser, explained to us the number of miles or blocks of streets in the city of Sioux Falls that were within the drainage area and would be benefitted

by being protected and drained by this drainage; also the benefits that would accrue to the two city parks and to the Sioux Falls water system and the elements of such benefit; the Board took all these elements into consideration in exercising its judgment and determining the amount of proportional benefits which it fixed against the city of Sioux Falls.

At the same time, Mr. Rettinghouse explained to the Board and the Board considered the elements of benefit which would accrue to the Northern States Power Co. by reason of the drainage; we went through that very thoroughly; the facts that the dam was put in adjacent to the river near Schotz, about three [unles] north of the city of Sioux Falls and that the controlling works in the nature of [wiers] were put in at Thompson's about ten miles north of the city were considered as elements of benefit to the Northern States Power Co. by reason of holding the water in the river and permitting to flow down and over its power plant; to by-pass the flood water

or a portion thereof through the ditch and save the
262 retarding effect of permitting that flood water to pass over the dams of the power company and pile upon and retard the whole power produced at the power plant also was considered an element of benefit; all of these matters were taken into consideration by the Board in determining the amount of benefit that should be fixed against the Northern States Power Co. The construction of this drainage project, several river cut-off channels, were put in up the river north of Sioux Falls, and in determining the Northern States Power Co. benefit the Board took into consideration the effect and influence of these cut-offs in hastening the flow of the flood water down the stream and shortening the time of floodage upon the power plant. All of these matters were taken into consideration by the board in exercising its judgment of the amount should be fixed, in the first instance against the Northern States Power Company.

The work that the Board did upon this drainage project consisted of constructing the spillway, cleaning and widening and deepening the ditch between here and Renner, diking the ditch and putting in the dam at Schotz and controlling works at the Thompson Bridge, and putting in these numerous river cut-offs.

The Court: Where is the Thompson Bridge?

A. Up where the ditch ends and turns into the river, and crosses the river and goes up on the other side.

The Court: How far is the Thompson Bridge from Sioux Falls?

A. About 12 or 14 miles.

The Court: How far is Renner from Sioux Falls?

A. 8 miles.

Q. Do you know the approximate present width of the ditch as it extends from Sioux Falls to Renner, or
263 thereabouts? A. No, I don't. That would be a mere guess.

Q. Isn't it in the neighborhood of 80 to 100 feet?

A. It probably is as far North as Renner.

Where we diked the ditch had taken the channel of the creek; there hadn't been dirt enough taken out to make a dike and when the floods came it backed up on the farm lands to the west of it; we diked there probably five or six feet high; and protecting those farm lands from overflow from the ditch after that; the dam at Schotz covered the break in the bank of the river about 150 feet wide and had the effect of keeping the water from the river from flowing in the bayou that is tapped by the ditch.

After the attempted assessment made in 1919, some work was still to be done in cleaning a portion of the ditch from Renner to the railroad tracks; settlement for this work had not been fully made.

Q. And this dam at Schjodt's that has finally been made to stand was not in at that time?

A. No, it was not.

Q. And some repair work has been done on the spillway since that time, has it not?

A. Yes, the control work at the bridge at Thompson's was put in since that time, but at the initial point of the ditch we haven't made any change.

Exhibit "1" is a copy of a map of the territory affected by drainage ditch No. 1 and 2 submitted by Mr. Rettinghouse to the Board as a part of his report.

We had a map similar to this upon which the percentages were marked before us when we made the inspection of the drainage before making the apportionment of benefits, on June 10th last,

Exhibit "1" offered in evidence by defendants and received in evidence.

264 Q. Mr. Risty, in applying and using this unit as explained by Mr. Rettinghouse to you, and as followed by the Board in fixing these apportionments of benefits of the various properties affected, you stated that you determined what the actual benefit to the unit selected was, and that its value was twenty-five dollars? A. Yes sir.

Q. Did you use that value of twenty-five dollars as the actual benefit to the unit in determining the apportionment of benefits which each of the various classes of lands aside from farm land should be assessed in this drainage proceedings?

A. We did. This was in regard to farm lands.

Q. And your engineer figured out the total benefit to each of these various pieces of property and divided that benefit by twenty-five, the value of the unit, to determine the number of units to be fixed against these various pieces of property?

A. Yes, that is the way we determined the number of units.

Q. That applies generally to all of the plaintiffs in these actions? A. Yes sir.

Q. Your understanding is that in determining the amount of the assessment upon this basis, that the total number of units are added together to determine the number of units, and the total cost of the ditch is computed and the total cost is divided by the number of units to get the actual assessed valuation of a unit? A. Yes sir.

F. E. WARD recalled on behalf of plaintiffs testified as follows:

The plaintiff's Exhibits "B" and "C" are part of the files and records of my office.

Exhibit "B" was offered in evidence by plaintiff and received in evidence. It is the resolution of the County Commissioners of Minnehaha County fixing the proportion of benefits on drainage ditch No. 1 and 2, dated June 10th, 1921; it is not printed here because it describes the same property, names and same persons, and fixes the same units as are described, named and fixed in Exhibit "C" printed as a part of the bill of complaint herein.

Exhibit "C" was offered in evidence by plaintiff and received in evidence. It is the same as Exhibit "C" printed herein as a part of the bill of complaint and for that reason is not reprinted here.

H. E. BARLOW, called and sworn on behalf of the plaintiffs, testified as follows:

(Direct Examination)

I am civil engineer of the Chicago, St. Paul, Minneapolis & Omaha Railway; the Sioux Falls-Mitchell branch of the Omaha enters the City of Sioux Falls from the west, crossing the big Sioux River and the bottoms approximately three miles west of the city. The line then swings somewhat to the south and enters the city on the southeastern corner again crossing the Big Sioux River and through the station grounds runs approximately north and south; the spillway is a couple of miles north of the line of the Omaha; in the west portion of the City of Sioux Falls there is a spur track known as the west side spur, which branches off from the main line a short distance west of the westerly course of the Big Sioux River, and runs approximately north and south for a distance of about a mile; the Omaha railroad has no agricultural lands in the City of Sioux Falls other than its right of way and depot grounds or in the drainage district involved in this controversy; all of its property consists of its railroad right-of-way, station grounds and appurtenances and is used exclusively for railroad purposes.

I know Mr. Rettinghouse, the engineer of the County
266 Commissioners in this drainage ditch matter; I called

upon him at his office in Sioux Falls and had an extended conversation with him during which he very kindly outlined the method by which he had arrived at the amount of benefits; this conversation was in February or March last; the information was given me by Mr. Rettinghouse but not in confidence; the method he used in arriving at the total benefits deals primarily with the question of bridges; at the point where the Omaha crosses the bottoms west of town, we have in addition to a hundred foot steel span over the main channel, an approach bridge approximately 233 feet long, and two other bridges east of the main river bridge, one 126 ft. and one somewhat shorter; in addition to these bridges we have a small one span pile bridge considerably west of these bridges which takes care of local drainage only and is not concerned in this question; Mr. Rettinghouse has figured that by reason of the diversion of a certain amount of flood waters of the Big Sioux River by means of the spillway constructed by the County authorities, the Omaha Railway would be justified in filling in certain of these approaches, particularly our bridges known as 129 and 130, aggregating 239 feet in length; these are the bridges a mile east of the main bridge over the river west of town about three miles out; he has

figured that it would cost to rebuild these bridges about \$25 a foot or \$5975; he has assumed that it will be necessary to rebuild these wooden structures about once in ten years; he has therefore figured that the average annual expenditure would be one-tenth of \$5975; he has capitalized this amount at 7% arriving at \$8536; then he has deducted the cost of filling these bridges and the riprap necessary to protect the dam; he has used this \$2000, which deducted from the \$8536

267 makes a net of \$6536 benefit on account of filling bridges 129 and 130; in a similar manner he has figured that we could fill the approaches to the two steel spans we have

here in town, where the amount of pile bridging is 166 ft. going through the same proposition [abd] capitalizing the annual expenditures and deducting the cost of filling he has arrived at \$2930; these bridges which we have here in town are what are known as through bridges; the supports are above the track, and Mr. Rettinghouse has figured that if the Omaha Company thought it desirable it might rebuild [tyose] bridges and substitute the deck built character construction which is a cheaper type construction, and by using shorter girders and necessitating two additional piers, this type of construction could be used, and he has planned to reproduce these bridges as through structures would cost \$45,500 and with the deck plate girder type would cost \$25,500, making a difference of \$20,000; then there is one other item which relates to the maintenance of the roadbed of the mile and $\frac{3}{4}$ length of track we have west of town in the district; this track has an embankment varying from 3 to 4 ft. to 10 or 12 ft.; he has figured that on account of the diversion of a part of the flood waters, the embankment would be less, consequently the amount of labor that would have to be expended in keeping up the track would be less by an amount equal to \$100 per year; he has capitalized this \$100 at 7% arriving at \$1400; in summarizing all of these items he arrived at the total benefit of \$30,866; now the assessment of the Omaha is fixed at 839.45 units; if 1 unit is approximately \$9.50, the total assessment would be \$7975; the total amount of benefit divided by the total number of units would make an average value of about \$36 for the unit; he has assessed us at approximately 25.8% of the total benefits; figuring the one unit at \$9.50.

The situation at the west crossing is that we cross the valley approximately at right angles; the valley is quite wide at this point; the track is on an embankment and has 268 these 4 openings; three of them are at a distance of about $\frac{1}{4}$ of a mile; the land north of the track on the upstream side is cultivated to a considerable extent, not in

the immediate vicinity of the bridges, but a short distance each way from the river the land is cultivated; in a time [or] normal high water this land is flooded and on account of the likelihood of holding this water an unnecessary length of time on this bottom land if we don't have considerable opening there through our embankment and taking into consideration the danger to the roadbed that might result if we closed the opening, it is my opinion that we would be unjustified in reducing the size of our openings or the length of them; in my opinion there are absolutely no benefits resulting to those bridges west of the city or to the railroad west of this city by virtue of this drainage ditch construction.

Referring to the bridge west of the depot in the City of Sioux Falls and taking up the question of the substitution of the belt girders for the trestle, the fact of the matter was that the Omaha Company has no intention of making any changes in these bridges; the bridges are amply strong for the locomotives we are now running or which we anticipate we will run in the future; there is absolutely no reason for disturbing the bridges at all; furthermore, if we should decide ever to substitute the plate girders we could do so and still have the light iron at about the high water of 1881.

There is one other point that has not been covered and that is in regard to filling the pile approaches; there are short approaches at each end; the west approach is 62 or 63 feet; and the east approach is 103 ft; we have felt that we could fill both of these approaches whenever we got around to it and could at any time; as a matter of fact it would involve considerable expense and we have felt it would
269 be better economy to maintain that type of approach; as to the filling of those approaches the drainage ditch construction has no effect one way or the other.

I have figured up the acreage the right-of-way of the Omaha Railroad in the drainage district amounts to; we have 22 acres on the main line, 21.2 of which is [one of] the west bottom and 5.89 acres on the west side spur previously described; these figures, include .2 of an acre in the vicinity of the bridge out here in the city and includes all the right-of-way within the drainage district sought to be assessed.

(Cross-Examination)

I have been in the business of civil engineering something over 22 years and have occupied my present position since the first of March 1920; it is a fact that water in flood seasons permitted to stand along side of the embankment which sup-

ports the tracks of the railway has a tendency to weaken that embankment and it necessarily requires a greater outlay of money to keep the bank in solid form; as a general proposition the more water standing there the more effect it has.

Q. Do you know when these bridges were built west of town?

A. I think our records disclose that they were built about 1880 or 1879, along in there.

Q. Then these extra full bridges were built at a time when all water was coming down the river?

A. Yes sir; the engineer building the bridges would naturally have in view that they would take care of all the water that came down the river; if the evidence should disclose in this case that from $\frac{1}{3}$ to $\frac{1}{2}$ of the water that comes down the river was diverted and does not pass under this bridge, it would not be the reasonable conclusion that at least part of the bridge could be done away with; I don't know how much water stood out there last year north of those bridges on the uphill side of those embankments; I don't know how much water there was the year before or the year before that.

Q. You do not know any of the data, but you are willing to swear you got no benefit, notwithstanding the fact that you do not know how much water stood there?

A. Yes, I am willing to say that.

I think it had no effect whatever; if only $\frac{1}{2}$ of the water came down the river last year that previously went under the bridges there would have been no benefit to our embankment in the solidity of the same and in the cost of the maintenance of it; it would make no difference how much water comes down the river unless it should go over the track and begin to wash the bottom out; I stated as a general proposition that when the embankment stood in water it had a tendency to weaken it and make a higher cost of maintenance; this fact is not true at this place and our embankment would stand all amounts of water; there is a peculiar reason why it should.

It is not a fact that we cannot run over that bridge the same class or weight of engines that bring our trains from St. Paul and Minneapolis to Sioux Falls; that bridge would not have to be changed if we wanted to run the same class or weight of engines to Mitchell; my company has not put in any different trestles since this spillway has been constructed; I have been in Sioux Falls several times; I think I was here in 1919; I think I was here in 1917 or 1918, and went over the

ditch matter at that time; our former chief engineer had at one time under consideration the question of the shortening of the bridge just east of here; my understanding is that the spillway is designed for 2000 second feet and could take an overload of 500 more, making a total of 2500.

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(Redirect Examination)

The special reasons why water standing by this railroad embankment did not affect it is that this particular embankment is very wide and deep and very heavily overgrown with vegetation and sod; in the vicinity of the river course where any washing has ever taken place are thoroughly protected by rip-rap; for this reason I believe that water standing along this particular embankment would have no effect on it in so far as the labor that would have to be expended in maintaining the tract is concerned; that is the answer that I would make to the claim of benefits made by Mr. Rettinghouse in regard to saving \$100 a year maintenance; my understanding is there has been no decrease in the force employed on the section since the construction of the spillway in 1918 and that would be the determining factor as to saving in maintenance account.

The reason why trains the same as come from St. Paul to Sioux Falls cannot be run to Mitchell is that we have other bridges between here and Mitchell which would not permit of the running of heavier locomotives; the bridge in Sioux Falls is restricted in our time card; we do not permit our heavier engines to go over it at the present time; as a matter of fact there is no reason why the heavy engines that operate down here cannot go over this particular bridge although it is restricted in our time card; there is no reason why the heavier engines should run any further than Sioux Falls if they cannot go clear through to Mitchell; Mr. Rettinghouse the engineer of the drainage district, was the former chief engineer of the Omaha road who had under consideration the question of changing the bridge at Sioux Falls.

C. GEELAN, called and sworn on behalf of the plaintiffs, testified as follows:

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(Direct Examination)

I am road master of the Chicago, St. Paul, Minneapolis & Omaha Railway from Worthington to Mitchell and from Luverne to Doone, and I have been since August 15, 1906; prior to becoming roadmaster, I was section foreman and extra

gang foreman; I was section foreman at Montrose; I started working for the Omaha in April, '80, and was employed by that road during 1881; I remember the flood waters of 1881; I was in Sioux Falls when the water was the highest; I am familiar with that portion of the Omaha Railroad in the City of Sioux Falls and west of the City comprised in the area sought to be assessed for the construction of drainage in this drainage district No. 1 and 2, and have been familiar with it since 1908; there is very little noticeable difference in the water conditions along that line of the Omaha railroad subsequent to the construction of the new spillway in 1918; I realize that more water has come down and stood on the bottoms, but it spread out such a wide territory across the bottoms that it didn't raise it very much; I wouldn't say that there has been more water on the bottoms west of the city and north of the Omaha Railway track since the construction of the spillway than there was before, but to my knowledge there is fully as much; I have seen the water conditions each year beginning with 1918 and have visited that part of the line and know how much water there was; the water that has collected in the field north of the track does not seem to have had any bad effect, that is, it doesn't seem to make any more particular, work across the bottom; I can't say it has a bad effect one way or the other either before or after the construction of the spillway; the construction of the spillway and other works in Drainage Ditch No. 1 and 2 has made no apparent difference

one way or the other as to the flood waters of the river
273 and as to the line of railroad of the Omaha west of the

city and east of the river; I can't say that there is any particular noticeable difference in regard to the water conditions at the bridge in the city of Sioux Falls before and after the construction of the new spillway; I am familiar with the course of the river through the City of Sioux Falls and have seen it each year since I have been roadmaster; so far as effects the maintenance and operation of the railroad, the difference is very little; in fact so far as the operation of the railroad is concerned, it doesn't affect the river being a little high or low west of the depot; it never has had any effect before or after the construction of the spillway with the exception of one year, that was 1881; that was the year there was an ice gorge formed in the southeastern part of the city; that gorge held the water back and when the ice gorge broke there was a flood which flooded the track about the location of the present station; the Omaha has never been troubled with water at its station or at its bridge west of the station since 1881.

(Cross-Examination)

I have been familiar with this particular part of the river between here and Montrose since 1880; in my travels back and forth over this road from year to year I have never set any permanent structure to indicate the course of the water at any particular year; when I say that the water is the same now as 5 or 10 years ago, that is the best of my judgment; in 1881 it washed out the whole line; in 1907 the waves had cut down into the bank and there was some riprap put there for fear it might wash; the water caused us additional expense and maintenance that year; if the water should pile up in the same way as it did in 1907, it would not be necessary to put riprap in again.

274 Q. You say the [height] of this water has been practically the same every spring? Were you advised of the fact that from one-third to one-half of the water coming down the valley had been diverted from your railroad?

A. Yes sir.

Q. Still the [height] of the water remains about the same each spring as to your railroad track?

A. Not the same every spring.

The [height] of the water as to the railroad track varies with each season but is relatively the same; if there should be an increase of 30% to 50% of the amount of water coming down the Sioux River the effect upon the track would be very little, if any; it would not require any more riprap and would stand up just as well as it does now; we would not need any greater flood bridges than we have now; we did need them in 1881 but it was then fixed out there to take care of the flood water we have kept the same amount of lineal feet of flood bridges since 1881 to take care of the flood water even since the spillway has been put in.

(Redirect Examination)

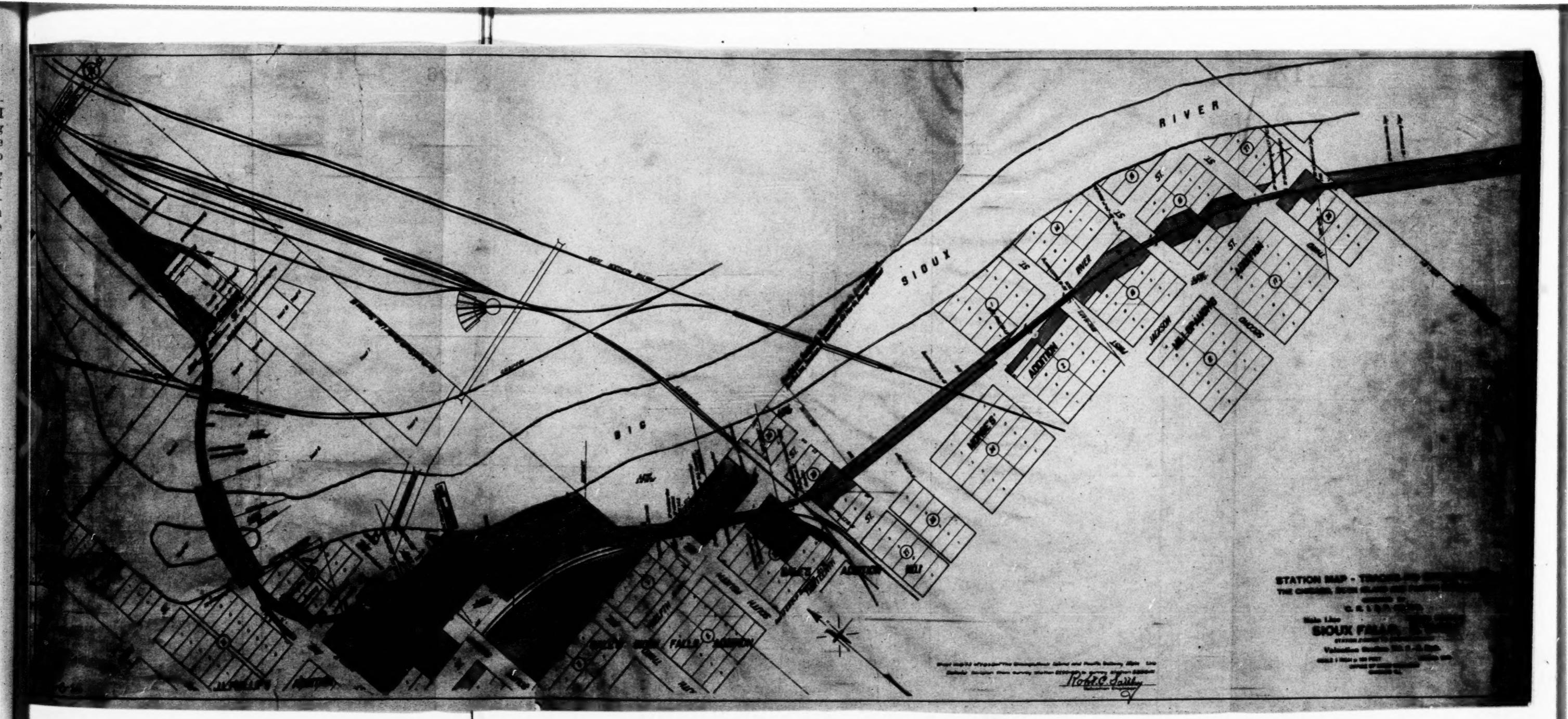
The riprap which was put in in 1907 was put in on the west spur which is possibly 500 ft. west of the main channel; it was on that branch or spur which runs north of the main line and the water has never since made any trouble; no other riprap has been put in.

276 B. A. WAITE, called as a witness on behalf of the plaintiffs, testified as follows:

(Direct Examination)

I am B. A. Waite of Des Moines, Iowa; am assistant Engineer of the Chicago, Rock Island and Pacific Railway. I have been Assistant Engineer of the Dakota division coming into Sioux Falls frequently. I became connected with the line that runs into Sioux Falls in 1907. From then down to the present time I have been on this division, five or six years, and while I was working in Chicago and in Davenport I worked on this territory part of the time. Am a Civil Engineer, practicing that profession since 1892. Am familiar with the right of way and the bridges and railroad tracks of the Rock Island Railroad within this drainage district. I have here a map showing the property owned by the Chicago, Rock Island & Pacific Railway within the City limits of Sioux Falls, marked Rock Island Exhibit "1". That is a correct blue print representing the right of way, the property owned by the Rock Island Railroad within the City limits of the City of Sioux Falls. The red pencil mark outlines the property owned by the Rock Island Railway.

Rock Island Exhibit "1" is offered in evidence by the plaintiffs and received.



I have computed the number of acres of property owned by the Rock Island Railroad within Drainage Districts No. 1 and 2, and as far as I can tell it is about thirty acres (30) or a little less. There are two bridges on the Rock Island across the Big Sioux River, one two miles east of town and one just north of the depot. The Rock Island comes into Sioux Falls from the southeast, crossing the river the first time two miles southeast of the City. It then comes up the west side of the river into Sioux Falls. It then crosses the river again within the City limits at the foot of 9th Street; that is a spur known as the Bismark spur. The trains do not cross this bridge. The Rock Island station is on the west side of the river on 10th Street. The Rock Island Railway Company has no property within this Drainage District that is used for agriculture and none of it has ever been so used. All of its property is used for railroad purposes, location of side tracks, industrial tracks, station grounds, roundhouse grounds and right of way of the main lines. The rock Island has no more property within the City of Sioux Falls or within this drainage area than is necessary for railroad purposes. The first half mile of the track from the east bridge toward the City is about eight feet above the average water of the Big Sioux River and is practically level with the adjoining ground near all the rest of the distance, and inside of the City limits it is above the level of the river about fifteen to twenty feet. That is true throughout the course of the line, except at the east end over the bottom where it is about eight feet above the river. Neither the track nor the embankment of the Rock Island has ever been reached by high water within my knowledge, and neither the track nor the right of way has ever been affected by high water from the Big Sioux River since I have known it. I have here a blue print of a cross section of the bridge about two miles southeast of town marked Rock Island Exhibit "2". I have checked the measurements over at this time and it is correct. There is in the center of this bridge a true span made of steel and then it has piled approaches. The approach on the east end is ninety-seven feet (97) and on the west end one hundred ninety feet (190), making a total bridge, including approaches, of four hundred nineteen feet (419). From the top of the tie to the bottom of the river is twenty feet.

Rock Island Exhibit "2" is offered in evidence and received.

278 I also have a cross section of the Bridge at 9th Street inside the City of Sioux Falls marked Rock Island Exhibit "3". This shows the construction of the bridge, with

the exception of the pile portion, which has been re-built since that plat was made. The plat was made in 1913 and part of the piling on the east end has been filled in since then. It was filled in gradually, took several years from 1913 to 1915 and the land on either side of the bridge was filled in as we filled in the approach. The shore line has been filled out on either side of the approach so the approach was of no use there.

The exhibit is offered and received in evidence.

In regard to the bridge southeast of town, we have never had any trouble with that bridge from high water to my knowledge, either before or after the building of the spillway. As an engineer I would not dare to fill in any of the bridge or any of the approaches at the present time, because at the present the waterway is no more than would be required according to our way of figuring the waterway required. We figure the drainage area on Dunn's tables and a certain proportion of that is the waterway required according to the area drained, and under such computation we have no more waterway under this bridge than is required for the area drained. The approaches to this bridge have not been in any way effected by the building of the spillway and the spillway has had no effect upon the bridge that I know of.

In regard to the bridge in the city at 9th Street. I understand it is proposed by Mr. Rittenhouse to eliminate one section of that bridge, that is the south or east one hundred ten feet (110) steel span truss. The bridge now is three hundred seven (307) feet long. If that span was taken out the bridge would be one hundred ninety-seven (197) feet long. I
279 would not dare to cut that bridge down to one hundred ninety-seven feet. The bridge as it is now is about the same length as the other railroad bridges on this stream. I believe that they have two one hundred foot (100) spans, and if we eliminate one hundred ten (110) feet this bridge would be shorter than the other bridges. This bridge on 9th Street was raised by the Rock Island before I came here. This span that is contemplated to be eliminated by the drainage engineer is filled in about half way. There is no water under it at the present time, the current is under the other end of the bridge. This was caused by the building out of approaches and driveways, pushing out the shore line. The spillway has nothing to do with the filling of this river on either side. It has been caused by the buildings being extended towards the river. There is at the present time a garage known as the Homan

Garage directly west of this span in the bridge and extending out at least half of the length of the approach, so that a line from the warehouse on the east side of the bridge to the corner of the garage would strike the middle of this span. I would not consider that it was reasonable engineering to eliminate any of this bridge. Since I have known this property the water of the Big Sioux River has never been over any of the track in any place, and I have known it since 1907.

(Cross-Examination).

It is twenty feet (20) from the rails on the bridge two miles south of town to the bottom of the river. This bridge was built in 1886. Either this bridge or replacements of it. Since 1907 it has been in the same condition. I have never compared this with the Great Northern Bridge down the river. I have never observed this bridge at extreme high water. From the area of the waterway required I would say that none of the approaches to this bridge could be filled in. I asked Mr.

Rittenhouse in regard to the waters had in this drainage area, and I think he said it was 4500 square miles.

This was the whole watershed. I do not know the slope of the land from north to south per mile. I do not know the velocity of the water, but from our rules we could not reduce the length of the bridge. The steel span in the center is 127 feet with pile approaches. These piles are treated and should last 20 to 30 yrs. We do not know just how long creosote piling will last.

I said that one of the approaches to the bridge within the City had been filled in gradually along about 1914. It has not caused us any trouble since then. Where the filling is there was formerly a trestlework. Under the present condition of the river since 1914 it has not been necessary to have as much approach to the bridge as when it was constructed. The shore line that I spoke about from the Homan Garage to the warehouse, that is in a bend in the river. I do not know the difference in elevation of the two bridges and I do not know the velocity of the water at either one of them.

Q. And still upon this information that you don't seem to possess as to the fundamentals as to how much water this river carries, the slope of the land, or the difference in the [height] of the land, you still wish to be understood that it would not be safe, in your judgment, to shorten these bridges?

A. Yes sir.

I do not know what would be the effect on the bridge here in town if the amount of water flowing down the river

should be increased thirty to fifty per cent. I think the one east of town would be all right, but I am not sure about the one here in town. The high water has never reached our embankment that I know of. I do not believe that the water has ever [crosses] our right of way. I do not remember of it. I have not been here very often for the last year, once before in the last six months, but have been here before.

281 My headquarters are at Des Moines. I have been here at high water periods. I could not tell you just what year, but I have been connected with this end of the railroad intermittently. I could not remember the year that they had high water when I was here.

(Redirect Examination.)

In regard to the filling in of the piling on the bridge in the City known as the Bismarck Spur, the land adjacent had been built out to the end of the piling so there was nothing but dead water that stood under it. The water could not flow under the piling on account of the land having been filled in on each side.

C. E. DEAN Called as Witness on Behalf of the Plaintiffs
Testified as Follows:

(Direct Examination.)

I live in St. Paul and am a bridge foreman on the Chicago, Rock Island & Pacific. I am a bridge foreman upon the division running into Sioux Falls. I began work here in the fall of 1893 and left this division in 1913, so that from 1893 down to 1913 I have known this railroad running into the City of Sioux Falls, with the exception of the years 1905, and 1906, when I was with another railway. From 1893 to 1897 I was a bridgeman. From 1897 to 1905 I was bridge foreman, and from 1907 to 1912 I was master carpenter on this division. I was familiar with the two bridges on the Rock Island within this drainage district at the time I was here and down to 1913. I remember when the bridge across the Big Sioux at the foot of 9th Street in the City of Sioux Falls was raised. It was raised about four feet on the two spans, but the old approaches were left alone. That was just before or about the time of the breakup of the ice in the spring. We contemplated

a flood. The report came that there was an ice gorge 282 up the river. We expected it to break loose and have heavy water. It had been a hard winter and the ice was heavy, but it did not materialize. We had no trouble from it. The bridge was lowered a little after that, but not

put back where it was originally. I think the permanent raise was about two and one-half feet and the ends dropped down to their original position. During the time that I was on the division we never had any trouble with the bridge southeast of town. I was here in 1907 when the spillway was put in, was master carpenter. I have never noticed any perceptible change in the condition of the water flowing under these two bridges before or after the building of the spillway. I have no record of high water marks myself. The building of the drainage ditch and the spillway has never benefitted these bridges in any way that I know of. From an engineering standpoint I cannot say but from a practical standpoint I would not fill in either of these bridges at the present time. I base my opinion upon the fact that the engineers as a rule do not give enough waterway. I have taken many an opening—for instance—four foot opening I put in once on the engineers orders and afterwards had to be a seventy foot opening. During the time that I have known the Rock Island property within the City of Sioux Falls the railroad track has never been under water. The water has never been up at the embankments at any place to my knowledge.

(Cross-Examination.)

I was here in the high water of 1911. There was no damage that I know of. I have not been here at any other time of high water except in 1897. I have never made any definite measurements of the water in the river. I do not know the amount of watershed that the river and the ditch drain, I do not know the elevation of the land from our right of way north and I do not know how fast the water flows. I do not know the amount of water that comes down the river, or that

comes down the drainage ditch. If the water was increased fifty per cent I do not believe the bridges 283 would stand it. The present bridges represent the same length of span that was here in 1893. Only the spans have all been renewed. There have been piers put in. The [piles] we are using now are creosoted piles. Piles not creosoted last about ten or twelve years, and this is true of hard wood culverts.

S. P. PERKINS Called as a Witness on Behalf of the Plaintiffs Testified as Follows:

(Direct Examination.)

I am an inspector on the Rock Island Railroad. I have been connected with the bridge and building department as bridge foreman and master carpenter. I was master carpenter on the division running into Sioux Falls from January 1, 1913, to June 1, 1920. During that time I was familiar with the two bridges on the Rock Island in the City of Sioux Falls. During that time there never was any high water that damaged or threatened to damage these two bridges in any way. The water has never been upon the embankment of the right of way of the Rock Island at any time to my knowledge. I have worked upon these bridges more or less. As a bridge man I would not think it safe or advisable as a railroading proposition to fill in any part of these two bridges. From my experience I have been obliged to put in several larger openings at different points where we have had similar openings. We have had to increase the length of the openings on account of high water, and I would not think it safe to close up any of these openings.

(Cross-Examination).

I do not know the number of acres of watershed drained by this ditch or by the Big Sioux River or the elevation of the land or the excessive or average rainfall for a year in this drainage district, and I do not know the capacity of the spill-way to take care of the water from the ditch, but I want the court to understand that these spans could not be safely shortened. That is based upon the fact that several times I have had to make openings larger and that is the foundation of my testimony.

284 A. F. PITCHER Called as a Witness on Behalf of the Plaintiff Testified as Follows:

(Direct Examination).

I am general agent of the Rock Island Railroad at Sioux Falls. Have been here since June, 1890. I was the agent of the Rock Island until 1914 and since then the general agent. I have been familiar with the property of the Rock Island within this drainage district for thirty-one years. The Rock Island has no property within this drainage district that has ever been used for agriculture and none of it is used for agriculture at the present time. It is all used for railroad purposes, roundhouses, stations and railway tracks. It has no land that is not necessary for railroad purposes at the present

time. The right of way and the rails upon the track in the city are about 20 feet above the water in the Big Sioux River at ordinary times. Two miles south of town, at what is known as The Cherry Creek bridge, they are about eight feet above the water. The right of way has never had any water standing on it in the Big Sioux River since I have known it, that is since 1890. None of the roadbed of the railway has ever been washed by the Sioux River. There has never been any difficulty with the bridge southeast of town in handling floods. In regard to the bridge at the foot of 9th Street in the City, in 1897 there were rumors that an ice gorge had formed and as a precautionary measure we raised this bridge at the foot of 9th Street but we found out it was not necessary. The high water did not develop. The Big Sioux River has never been out of its bank here in the City of Sioux Falls since 1890.

(Cross-Examination).

I live in Sioux Falls and worked for the Rock Island Railroad Company in 1916, 1917 and 1918 and at that time knew about this new ditch going in. I saw the publications in the newspapers. I knew it was being constructed. I went over to the spillway and saw it in the course of construction. I know of no reason why the land of the Chicago, Rock
285 Island & Pacific Railway Company could not be used for agricultural purposes if not covered with the railroad tracks. It has agricultural land as a basis.

C. M. BASSETT called and sworn on behalf of the plaintiff testified as follows:

(Direct Examination)

My name is C. M. Bassett; I live in Sioux City; I have been a civil engineer 24 years; I am assistant engineer of the Great Northern Railway Company; I have been in its engineering department 9 years; at the present time I have jurisdiction of the entire Sioux City Division, including all of Minnehaha County, South Dakota; I have been in charge of that Division since the spring of 1916; during that period of time I have made frequent trips to Sioux Falls, and over the lines throughout Minnehaha County; for two years 1916-17 I was in Sioux Falls practically all the time; since then I have been here practically every week. I am familiar with what is known as drainage ditch Number 1 and 2, and the spillway; I am also assistant engineer of the Watertown and Sioux Falls Railroad Company; its line is located along the

ditch for about 3½ miles; every spring I have been to the spillway; then I have been over the entire line of the ditch and looked at the various head-works and retaining dams; the line of the Great Northern enters the city of Sioux Falls from a northeasterly direction at a point about a mile and a half from the mouth of the spillway; that is the nearest point on the line of the Great Northern to the mouth of the spillway; the course of the line of the Great Northern as it goes through the city of Sioux Falls and around south of the City and down through Section 31 is as follows: We enter in a northeasterly direction and then through town we go practically north and south and then we swing southeasterly towards Yankton; Exhibit 1 is a plat I prepared or caused to be prepared, showing the location of the line of the Great Northern over the area referred to and the general location of a portion of drainage ditch Number 1 and 2 and the
287 location of the bridges along the line of the Great Northern within the area referred to; the plan is drawn to scale, 1 mile to the inch.

Plaintiff offered and it was received in evidence, Great Northern Exhibit 1.

286 (Great Northern Exhibit 1, Map showing location of
lines of Great Northern Railway Co.)

The acreage of the right of way and station grounds of the Great Northern Railway within the area in question, Sections 16, 27 and 31, Township 101, Range 49, is 27.14 acres; the acreage of the station grounds included in that is 6.09 acres; tract 11 consisting of approximately one and one half acres is not included within the 27 and a fraction acres; tract 11 lies at the north end of our bridge 146 and on the west side of the main line; it is between the Omaha and Great Northern rights of way and the Milwaukee is on the north; it is just south of Tenth Street; it would be on Eleventh Street if it were extended out; it is an irregular tract; it was originally purchased for station grounds and is part of the station grounds of the Great Northern; it is bounded on the east by our grade; on the north, the Great Northern and Milwaukee connection; on the west the Omaha grade and on the south the river; the tracts of the various railway companies bounding it I would say are about ten feet above the natural surface of the ground; tract 11 has never been used for agricultural purposes; I would not consider it agricultural land; it is not accessible; it is bounded by the river and three railroad rights of way on there is no road into it; no one could get into it to farm it; it is not feasible for that purpose. I am familiar in a general way with the channel and banks of the Big Sioux River from a point near our bridge in the city of Sioux Falls; the North bridge down to and through Section 31; to the south of town the banks of the river are well defined; there is a deep channel there and the river is confined to that channel, through town there is a greater chance; the channel is wider and the banks are

288 not so steep; as you go further north the channel again deepens and it is confined, the valley is narrowed considerably south of town; I am acquainted with Mr. Rettinghouse; I had a conversation with him in reference to the manner or basis upon which he based his opinion and report to the Board of County Commissioners with reference to the alleged benefit to the right of way, bridges, tracks and embankments of the Great Northern Railway from Drainage ditch No. 1 and 2 and the spillway in question; the first conversation with him was in early spring of this year; the last one was about ten days ago, I think it was last week; during the first conversation Mr. Rettinghouse stated that he had figured we could shorten our bridge and had figured out the cost of renewing those and the cost of filling and made deductions and based his figure on that amount capitalized at seven per cent, and divided by twenty-five per cent, was what our assessment came to—the number of units.

"Q. In your conversation approximately ten days ago, did he go more into detail with reference to the subject?

A. Yes sir.

Q. State the substance of that conversation.

Objected to as not binding upon the defendant commissioners.

Overruled.

A. We have two bridges within the area, and he stated bridge 150-7 that that bridge was about the right size, and bridge 146-0 we could shorten approximately 323 feet, and that he had capitalized that amount, but I didn't get the exact figures, and figured on the amount saved by the shortening of the bridge.

Counsel.

At this time, if the Court please, the defendants object
289 and ask that the question be stricken, and objects to the testimony on behalf of the plaintiff company, and to the proposition of whether or not the plaintiffs are benefitted or not, or the extent thereof, by the drainage project, for the reason the same is incompetent, irrelevant and immaterial to any of the issues in this case, and for the reason that the evidence now shows that the Board of County Commissioners of Minnehaha County had jurisdiction in the same matter in these proceedings, and proceeded with the construction and repair of the ditch in question. For the further reason that this Court has no original jurisdiction of a bill in equity to reject or control proceedings of the Board of County Commissioners of Minnehaha County in the construction or reconstruction and repair of this ditch. And that the plaintiffs have a plain adequate and complete remedy at law, by appeal from the equalization arising from the proceedings taken by the Board of County Commissioners. For the further reason, it calls for evidence of a fact, the determination of which is in the exclusive jurisdiction of the Board of County Commissioners, and has been decided by that tribunal, which decision is conclusive and cannot be inquired into by this Court. That it is an attempt to impeach the determination of that tribunal in this action, and with no allegation or proof of fraud or arbitrary action on the part of that tribunal. Is not within the issues of the case and not a proper subject of inquiry in these collateral proceedings, and does not present a federal question.

May we have the record show that that objection goes to the testimony offered in behalf of the plaintiffs in these proceedings attacking the question of whether or not they are or are not benefitted by the ditch proceedings?

2.0 The Court: Yes, the motion is denied. The testimony is received subject to objection. Mr. Rettinghouse made no statement to me with reference to any other element of benefit to the Great Northern Railroad than the shortening of the north bridge within the city limits; basing my answer upon my knowledge of drainage ditch No. 1 and 2, the spillway, the location and construction of the tracks, bridges and embankments of the Great Northern Railroad Company, and my knowledge of the waters in the Big Sioux River; in my opinion no benefit result to such right of way tract, bridges, embankments or station grounds from drainage ditch No. 1 and including the spillway; no part of the right of way, tracks or bridges within the area in question to my knowledge have ever been flooded by the waters of the Big Sioux River; we have a plan drawn up for a new steel bridge at bridge 146 which provides for shortening of fifty feet of that bridge and putting in deck girders which are much lower and nearer the water; we considered that owing to the fact that we are lowering the steel we would have to provide practically the same opening we have there now; in planning to shorten the bridge fifty feet we did not take into consideration the existence of the drainage ditch; the present height of the track on this bridge above what I understand to be the high water mark of the Big Sioux River, according to our best record is eleven feet; if I were planning to construct new the bridges in question on the Great Northern, or to rebuild them, in determining the sizes of the openings from an engineering standpoint, I would not take into consideration the existence of drainage ditch No. 1 and 2, because my observation has been that before the spillway went out in 1916, and the water conditions have been just the same; I consider there is great danger as the spillway is constructed now of its going out, and there is danger that they will have to close the ditch and turn the water back into the original channel; I would not take it into consideration even if the ditch and spillway were working at capacity; I don't think it takes enough water out of the river to make any material difference; I would plan new openings without considering the ditch and considering the highest possible water in the river; I would consider it bad engineering to plan otherwise.

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I observed the flood waters that entered the ditch coming out of the ditch north of Sioux Falls and re-entering the Big Sioux River; on the Watertown and Sioux Falls we are flooded every year just south of the city pumping plant at the top of the hill; the water comes out of the ditch and goes over our track; it has every year I have been here; we have probably over six inches over the top of our track; the water stands in there, sometimes for probably ten days on the Watertown and Sioux Falls line.

The length of the north bridge is 615 feet; I do not think it would be good engineering or safe for us to shorten that bridge more than fifty feet under any conditions; as I have stated, for some period of time we have contemplated the construction of a new bridge and of a different type, and shortening it fifty feet; as constructed at present the bridges are supported by a truss above, and in contemplating the new construction we had in mind what we called a deck girder, and that support is below the rail which makes a difference; our plan will be to lower it five or six feet due to the use of deck type girders instead of the truss now used; in planning this new bridge we did not take into consideration the possible effect of the drainage ditch.

(Cross-Examination)

When we lower five or six feet, the girders I have mentioned which are in the nature of I beams probably five feet thick, will still be underneath the track; the elevation of the track would remain the same as the bridge work is all underneath the track; from my observation I say that during the last five years the water from the south bridge and north to the termination of our line in the city has remained about the same; during this same time the water has been high enough up around the penitentiary where the Watertown track goes to flood its tracks some inches of water every year; the water that came over the Watertown & Sioux Falls came out of the ditch; I have been told and know approximately the amount of watershed in this drainage project; I couldn't say off hand how much it is; I haven't the figures with me; I do not know how much water really falls in the watershed when we have high water here; I know generally the topography of the country north of Sioux Falls through which this water is collected and conveyed by the river and ditch south; I have been pretty well all over its; I do not know the number of cubic feet of water the river carries per second when it is banked full at flood time, nor the

whole capacity of the ditch and spillway; I was up there when they were building the spillway in 1917 and have been watching it; I didn't like the construction; I saw them repairing the ditch on north and throwing up embankments on either side; I am still of the opinion that the spillway isn't what it should be; I have seen it every year since then; I know of no reason why if the tracks were not upon the right of way and station grounds, those premises could not be used for agricultural purposes, except our station grounds which are right on top of rock; Section 31 and 27 could be used; Tract 11 I don't think has any soil to amount to anything on it; the bridge south of town is 304 feet long and takes care of the water; the bridge in town is 615; since I have been on the division there has been no new bridge put in; these bridges have been constructed for some years and before the spillway project was put in; I judge that they were put in to take care of the water that came down the Sioux River at the time; the water has come out of the ditch every year since the spillway was put in; north of the city at level siding 293 the water has come out of the ditch over the tracks of the Watertown & Sioux Falls Company right at the city pumping plant; it comes through the dikes in the ditch.

(Redirect Examination).

Along the right of way south of town we have an embankment about 1800 feet long; bridge 150-7; it is about 16 feet deep; side slopes approximately one and one half to one, approximately fifteen feet high; the toe is protected in some places with rip rap, and it is now overgrown with grass and weeds; that embankment is so constructed as to withstand any possible flood condition in this neighborhood.

THOMAS SIMPSON, called and sworn on behalf of the plaintiff, testified as follows:

(Direct Examination).

My name is Thomas Simpson; I have lived in Sioux Falls twenty-seven years; I am general agent of the Great Northern Railway Company at Sioux Falls, and have been its agent for twenty-seven years; I am familiar with the line of the Great Northern included within the area in question here in Section 16, 27 and 31; during such twenty-seven year period no part of the tracks, bridges or right of way of the Great Northern Railway within that area has been flooded, we have had no trouble during that period of time from high water; the sta-

tion of the Great Northern is east of the river; I have lived on the west side of the river twenty-seven years; the depot has been located where it is now approximately fifteen years; during that time I have crossed the Big Sioux River several times a day and I have not observed any appreciable difference in the flow of the Big Sioux River before and after the construction of the spillway.

(Cross-Examination).

During the time referred to in my testimony the [height] of the river has fluctuated, but there has been no floods; the [heights] during flood periods has been at about the 294 same level; I do not know how much water the spillway takes care of or how much the river banks carry; I heard about it when they put in the spillway.

ANDREW NELSON Called and Sworn on Behalf of the Plaintiff Testified as Follows:

(Direct Examination).

I am section foreman for the Chicago, Milwaukee & St. Paul Railway between Baltic and Renner. Renner is six miles and Baltic fourteen miles north of Sioux Falls. I have been section foreman there twenty-seven years and was foreman in 1916. There is a place on my section where the drainage ditch is just outside of the right of way. I think they diked it there four feet just outside of the right of way. From a point about four miles south of Baltic the ditch is on the west side of the railway, and from that point down to Renner it runs close to the track. The Ditch runs between the railroad and the river and the ditch and the river are both on the west side of the track. In 1916 at a point four miles south of Baltic the dam went out of the river and the river let the water in the ditch. The ditch couldn't carry the water and it went over the bank and washed the dike out, and a few miles further south it washed the track and let all the water out over the farms around. It flooded the farms around there and washed back on the track. This water came from the ditch. The ditch is constructed with a dike and the water broke through that dike. Before the water came out of the ditch there was no water east of the track. The water came into the ditch and went out of the ditch and washed all the track out and flooded the ground. The water in the ditch came from the river. I did not have any trouble with the water in 1919 and 1920. It came out of the ditch at several places, but not

enough in those two years to hurt the track. In 1919 and 1920
the water came out and went up to the track and the
295 ditch was full of water. It came to the bottom of the
railroad track but didn't cut in much or wash. At the
time the water came through and flowed up to the top of the
bridge there was no water east of the railroad track. There
was no flood water between the ditch and the river until the
water ran out of the ditch. It ran out of the ditch and filled
up between the river and the ditch too. It went over the dike
on the west side of the ditch. The origin of that water was the
river. In 1916 the water remained on the lands that were
overflowed about ten days or two weeks. In 1919 and 1920 it
stayed over two weeks. It stayed a little longer in 1920 than
in 1916. The point at which the ditch protects the track is
about a half mile south of the Thompson bridge. The ditch
comes to the right of way at the Thompson bridge and runs
nearly four miles down the track. The water comes in the
ditch where that bridge is built. There has always been a
bridge there. They built a cement bridge there a year ago.
It is a highway bridge. At the point where I said it washed out
we had to put in riff raff. We had to build a bridge there tem-
porarily and afterwards we filled it with riff raff and it is riff
raff now.

(Cross-Examination).

The water wall washed the track out the way the bridge is
put in there. The water in 1916 washed out part of the track
but not at the place where the bridge is. That was the year
the old spillway went out and there was high water that year.
I have no idea of the amount of rain or water that was carried
by the river or the ditch in 1916, 1919 or 1920. In 1897 the
track was washed out south of Renner. In 1916 the water did
not cover the abutting lands before it went through the track,
but it did not cover half as much ground as it did in 1897.
Then it covered all over the East side after it got through the
track. If the dikes were raised a foot or two they would keep
more water in than they do now. Our track was not injured
in 1920.

296 NELS OLESON Called and Sworn on Behalf of the Plain-
tiff Testified as Follows:

(Direct Examination).

I am section foreman for the Chicago, Milwaukee & St.
Paul Railway Company. I started in 1887 as a laborer. The
most of the time I have been employed as section foreman I
worked in the yard five miles south of Sioux Falls. I have

been continuously living here and working for the railroad company since 1887. I have not noticed any injury to railroad property or to railroad property covered by waters from Sioux River south of here during that time, and none in Sioux Falls. I do not know of any water doing any damage on J. L. Phillips' Addition and on the Millspaugh's Addition near the roundhouse, or east of the roundhouse, or north of the ice house. I do not know of any flood waters doing any damage to railroad property since I have been here. There are five tracks in the new yard in what they call Daniel's Addition and Millspaugh's Addition in the vicinity of the ice house east of the depot. I do not know of any damage being done there. There has been no interference with any of these tracks by the waters of the Sioux River since I have been here. There has never been any difficulty or damage on account of the flood waters at the roundhouse property.

(Cross-Examination).

The ice generally comes down in the spring and goes over on the east side and over the rocks there. There is a current through the east side of the channel of the river and it lifts the ice right around the roundhouse. The water comes close to the roundhouse but never does any harm. It does not come out to the banks by the ice house very much. I never saw water standing in the ditch alongside the track on the ice house side.

"Q. You don't know, Mr. Oleson, whether or not the amount of water that has been gathered into the Sioux 297 River and the ditch above Sioux Falls in the past five or ten years has increased or not, do you?

A. I couldn't tell you about that.

Q. And so if there is twice as much water coming down this valley as previously came down, you couldn't say that was true or not?

A. If the water raised five or ten feet I could tell.

Q. You don't know the actual amount of water?

A. No, I don't know nothing about that."

WILLIAM SHEA Called and Sworn on Behalf of the Plaintiff
Testified as Follows:

(Direct Examination).

I am general road master of the Chicago, Milwaukee & St. Paul Railway Company, and have been such about four years. Prior to that time I was district general road master and di-

vision road master. I have been in these divisions for the railroad since 1890. Prior to that time I was track laborer and section foreman and construction foreman. We have many miles of railroad built across river bottoms and creek bottoms where we have to maintain grades that will guaranty us that we can operate our railroad during high water. The Chicago, Milwaukee & St. Paul have many lines upon which heavy traffic is carried upon which they have tracks to maintain under such a situation. I have been over the line between here and Baltic and have noticed the material of which the grade is constructed. From what has been my experience and observation I would state that adjacent water standing alongside of and extending against the grades has no effect upon the maintenance of the grade or the stability of the track upon it, for the reason that we used our track embankment in many cases as the bulkhead to our reservoirs of water for engine supply. We do not hesitate to use our track bank for that purpose. We have many of them on our railroad and we do not notice that we have any bad results from it.

298 No additional expense of up-keep is occasioned by that situation on embankments twenty years old or over.

We prepare our property for the purpose we are going to use it for by building up a track bank. In this particular instance, it would cost from \$800 to \$1,000 an acre for us to build up the track bank and make the line serviceable for our purpose, which in this case is about what that cost up there. I do not believe the farmers ever went to any expense worth mentioning in that community to prepare their properties that way. I didn't notice anything of the kind. The overflow upon this embankment or alongside the embankment would have no effect whatever upon the railroad bridge. If the flood remained two or three, or five days, upon the adjoining agricultural land I think it would ruin their crops.

(Cross-Examination.)

It would cost \$800 to \$1,000 per acre to prepare our right of way for railroad purposes, and if the embankments would wash out it would cost something like that to replace it. It has not been our experience in washouts that the damage to the right of way of the railroad would be greater than it would be to the farm land. When the water goes over it generally breaks through the embankment and cuts out a short piece, or whatever is necessary to carry the overflow of water from one side of the track to the other. After the water would get over our track it would not take our entire roadbed out, just break through and make openings similar to the kind

we have in other places known as arches. It would not necessarily take out our entire embankment. Yes, when this embankment is taken and is washed away it does hold up our traffic and cuts off our income during that time just the same as the farmers. It costs about twenty-five dollars a cubic yard to put the dirt back in a washout.

I am familiar with this branch of the railroad running north and going through the drainage district. I pass over 299 it and inspect it in different ways three or four times a year. We have had no washouts for the last four years, other than that the water got up on the track in 1919 and 1920. This year it didn't come over the track but it got very close to it. We possibly delayed our traffic. I came over on this line in 1918.

WILLIAM E. WOODS Called and Sworn on Behalf of the Plaintiff Testified as Follows:

(Direct Examination)

I am assistant district engineer of the Chicago, Milwaukee & St. Paul Railway and have been in the employ of that company about thirty years in the engineering department. I am familiar with the lines of the Chicago, Milwaukee & St. Paul Railway described in the notice of assessment published in the Daily Argus Leader dated August 13, 1921. None of the land of the railway company is used for agricultural purposes. The width of the right of way is usually one hundred feet, being 50 feet on each side of the center line of the main track. We have a little piece of right of way in Sioux Falls 50 feet wide, being 25 feet on each side of center line. There is approximately 198 acres of right of way in the drainage district, none of which is agricultural land. I am acquainted with the lands described as Lots 13, 14 and 15, of Block 28 of Millspaugh's Addition to Sioux Falls. That property is near the ice house property south and east of the town. It is used for new yard tracks. The main line lies between the trackage of this yard and the river. These tracks are lower than the main tracks. The main track was built in 1879. It has never been disturbed by high water. It remains in the same position as when originally constructed. Block 9 of Daniel's Addition to Sioux Falls is just east of Millspaugh's Addition and is used in the same manner. Lots 5, 6, 7, 8, and 9 in Block 25 of J. L. Phillips' Addition to Sioux Falls is used for round-house and ice tracks and turning table. This property is situated on the west bank of the Sioux River about 18 or 20 feet above the surface of the water.

(Cross-Examination)

The Chicago, Milwaukee & St. Paul Railway Company have 198 acres altogether in the drainage district. That includes what is known as the right of way of the north branch and also includes same going south. A very small portion of that 198 acres is taken up by the roundhouse grounds and the yard out near the ice house. The most of it is right of way. If there were no railroad through the most of it it could I presume be used for agricultural purposes.

A. G. HOLT, called and sworn on behalf of the plaintiff testified as follows:

(Direct Examination)

I am assistant chief engineer of the Chicago, Milwaukee & St. Paul Railway Company and have held that position about eight years. I am a civil engineer by profession and have been connected with the railroad company in a professional capacity about thirty years. I am familiar with and have made a study of the matter of locating lines of road. In turning the line of road from one point to another the character of the country generally determines or controls the location of the line. In locating a line of road through the Sioux Valley an engineer would necessarily have in mind as one of the elements the cost of construction. He would have in mind the height of embankment to be constructed and maintained on account of flood waters. That would be an important feature. In making a location it is a part of the duty of the locating engineer to find out the height of the flood waters of the various streams he crosses. The grade line is usually established with reference to the high water. The engineer gets as much information as he can in regard to the elevation that the high water reaches in the valley. He gets the information partially from the people who live there and partly from his observation of high water marks as they are shown on trees and washes in the sides of the valley. He then determines largely the height of the grade from past experience as indicated by the information he has received. In determining the openings and bridges the engineer makes what is called a ravine section. That is a chart showing the elevation of the valley. Then on this chart he shows the elevation of the high water and from that he computes the size of the bridges and the openings, that will be required to carry that water. There are certain rules adopted by railway companies upon which these computations are made, and they

are made as an engineering proposition. I have recently examined the territory put into the drainage district. In locating a new line of railroad through the Sioux valley occupying the place where the Milwaukee railroad now has its track you would have to take into consideration the fact that the drainage ditch was there. You would have to provide a bridge to span it. In providing the openings in bridges and other provisions in the line for overflow of water I would not make any deductions on account of that ditch, because I would figure that at the time of the flood the entire valley would be covered with water and this ditch would be simply a wrinkle in the valley. When the flood waters were the highest they would cover the ditch up. I do not know the amount of cubic feet of water the river carries per second. I do not know the cubic feet of water per second the ditch carries, yet I think the ditch is a wrinkle.

In computing the space I have testified about which I would make for a bridge, I do not think the speed of the water in passing a given point would make any difference if you had a high water mark that was dependable. If subsequent to the time I had that high water mark something was done to increase the speed of the water in passing a certain point I would have to take that into consideration.

It is stipulated that the mileage of the Great Northern within the drainage district in question, to-wit: Sections 27, 16 and 31, is 3.04 miles.

It is stipulated that the mileage of the Rock Island Railroad within Minnehaha County is 4.3 miles and within the district sought to be assessed 3.5 miles.

THOMAS HARDIMON, called and sworn on behalf of the plaintiff, testified as follows:

(Direct Examination)

I have lived in the City of Sioux Falls since April, 1879. I am a member of the City Commission and am in charge of the roads, streets and highways of the City. I have been a City Commissioner of the City of Sioux Falls for nine years last October. Since 1879 my occupation has been constructing and road work a great deal of the time. Some of the time I have done bridge work on railroads. I was in Sioux Falls in 1881 at the time of the big flood. There was an ice gorge out on the south side right over where the bridge runs on the Coats

farm. When it came through the City it took all the bridges but one and swept up the mills and lumber yard on the east side. The only thing left on the east side was the Omaha railroad bridge. With the exception of that flood which was caused by the ice gorge there has never been any high water since I have been here that has done any damage to the property of the City. The Coats farm is about two miles southeast of here. I think the west line of the farm is in the neighborhood of Eleventh or Twelfth Avenue. It is probably eighteen miles from the spillway following the course of the river around. I am familiar with the photograph of the channel of the river from Sherman Park down through the City. As you leave Sherman Park the most of the shore line is fairly level on one side. On the other side it is higher and goes up further from the river. For several miles there is a high plain on the right hand side as you go down the river. The banks on the left side are fairly high too in places.

303 From the time you leave Sherman Park until you get down below where the ice gorge formed in 1881 you have a very decided embankment on each side of the river. The river through the territory I have mentioned is much narrower than it is up above Sherman Park. The ice gorge at the Coats farm held all of the water that collected there, except what ran in the channel until the ice gave way. It gorged different places there. It kept creeping along there for probably two or three days before it came down here. The waters did not spread out on either bank of the river. There was no gorge close to the neighborhood where the Milwaukee round-house is now in 1881.

I was here when the Great Northern bridge was built that crosses the river about Seventh Avenue and worked on that bridge. During the past nine years my duties in regard to city property have been overseeing it and attending to it, and also attending to the bridges across the river through the City and matters of that kind. From the experience which I have had during a residence of over forty years here I should say the results would be very unsafe of narrowing the bridges and lowering them in case of extra high water. This would be on account of the volume of water, and in case of ice gorges would leave it too narrow underneath. If a flood took one it would probably take all of them and form a gorge.

The east side of Sioux Falls is thickly built up with business places, wholesale places and residences, lumber yards,

and institutions of that kind. The City pumping station and the City electric light station are situated half or three quarters of a mile north of First Street. The pumping station is south and west of the spillway. The electric light and water plant is south and west of the pumping station. The spillway runs to the north and east of our property. The water 304 plant and the electric light plant are a little north and west of the Penitentiary. I observed conditions of the water around the electric light and water stations during the years 1919 and 1920. I was up there on different occasions when there was any danger or any prospect of water. My official duties required me to be there and investigate those things from time to time. The water around the City electric light plant and pumping station was greater in 1920 than it was any year prior to that excepting 1881. I do not remember so much about it in 1919. We were up there quite a number of times in 1920. When we went in there the water was over the tracks of the two railroads there and there was also a flood down almost to Russell Street and from there down to Covell's Lake. The high water subsequent to 1881 has done no damage to speak of that I know to the City property in the City of Sioux Falls. The water went over Minnesota Avenue in 1920 but not enough to amount to anything. It took a few loads of cinders to patch it up. I never saw the water on the West Sioux Falls road, with the exception of 1881, any higher than it was in 1920. Each street there is two and one-half or three feet above natural ground. In 1920 it went up to just about where it could go over. Then the bridge there carried it down to Covell's Street bridge and it flowed away. Phillip's Park runs along the east bank of Covell's Lake and goes up very abruptly to the east, all except a little piece down at the First Street bridge. There is a little corner there that is a little low, but the balance of it runs up to the east and slopes quite sharply. It has some fruit trees and some other trees on it and has been terraced up in the shape of a park. It is quite broken and is not agricultural land and is not used for agricultural purposes.

305 Sherman Park is very low and all timber and is in where the river bends around considerable. The west side runs quite flat but the east side goes up very abruptly. No part of Sherman Park is agricultural land. Sherman Park overflows pretty nearly every year. The bed of the stream forms a circle in the Park for probably three quarters of a mile. I do not know that the spillway and those ditches have ever been of any benefit to city property. It is pretty hard to state whether or not the spillway materially effects the flow

of the water through the City, because when the water is high it overflows a lot which comes down in the spillway and almost directly east of the pumping station. Then it comes out through a little ravine and into Covell's Lake and finally into the river.

The City has a park known as Lien's Park near where the spillway empties into the river. It has practically put the park out of commission. The water practically keeps it covered and washed out considerable. There has been an attempt to riff raff or dam it up but it has been of no avail. That condition did not exist prior to the establishing of the spillway.

In the City pumping station and electric light plant there are five wells, four of them are 25 to 50 feet in diameter. The last one is U shaped and is 16 feet. The furtherest one west is close to a mile west of the station. The City has a piece of ground that surrounds the well directly north of the pumping station. As I remember, there are about twelve acres in it. It is planted to young willow trees. Well No. 1 is located on this tract and well No. 2 is right close to it and directly west. Then follow each well after that up to No. 5. It is probably 30 or 40 rods running east and west at right angles west of the road. The tract is enough as the population of the City increases from year to year for the establishment of 306 additional wells as the needs of the people require.

All of the property other than I have described that is the three parks, the City pumping station and the electric light station, that is included in the assessment is the streets.

(Cross Examination)

There was high water in 1920.

"Q. Did you not testify in the case of Gilseth vs. County Commissioners, that if this ditch had not been reconstructed and the river had been permitted to take its then course over the bluff it would have destroyed the waterworks of the City?

A. It might".

The water was high twice that year; in the first place when the spring rains came and the snow went off, and then along about the first of June there was a heavy rain in the neighborhood of Flandreau that reached us a few days afterwards.

"Q. And the water was so high that year that it contaminated the city wells and it was necessary for your department to place certain notices in the city papers, in which

you informed the patrons of the water company that they should boil all water before using it?

A. The commissioner of water might have done that. Never anything of that kind came before the Board that I know anything about.

Q. As a matter of fact the water did come into the wells in 1920, surface water?

A. I don't know. I would not want to say one way or the other." The city owns a plat of land known as Sherman Park within the drainage area; it is owned and kept by the city for park purposes; it is practically overflowed every spring; I do not recall whether it was overflowed in the spring of 1921; I was not there that spring; the water does not need to get up but a little ways because the land is very low; the river forms the letter S just around it. Possibly anything that tends to divert a portion of the water that comes down the Sioux Valley and keeps it out of the river as it goes through Sherman Park would be a benefit to that park; there is none of the Covell's Lake Park, excepting a little piece of ground just by First Street Bridge, that would be overflowed; I do not think the water would cover one whole lot; we have 125 miles of street, and some of them cost more for up-keep and some of them cost less; I think the up-keep would be somewhere in the neighborhood of \$100 per mile; in 1920 during the high water, the water came up on the [wides] of the West Sioux Falls road, but didn't cross it; the roadway is much higher than the surrounding ground;

"Q. That is true when Sherman Park floods, isn't it. The refuse from the river [funs] up on the banks and is left there, and a very healthy crop of mosquitos is produced?

A. There is a very good reason for that. Sherman Park is filled with little ravines and is very much shaded. It is much better now than it was because many of the trees have been cut out.

Q. Directing your attention to the Park again, those conditions are true every time that it floods, that it causes an unsanitary condition there?

A. I presume it does to a certain extent."

We have abandoned Lien's Park on account of the water, which has practically cut out the park; it has been kept open, and there are some picnics held there, but it is practically abandoned; it is a little north and east of the Pententiary, and just a little west of the spillway.

308 In my judgment it would be unsafe to change the lengths of the railroad bridges and other bridges across the Sioux River in town. The Omaha bridge is some wider than the Eighth Street bridge, I think. They have filled some of the trestles of the Omaha. It is not so wide as it was before. As the Eighth Street bridge now stands, I think it has always served its purpose of letting all of the water of the river pass underneath it. I do not know the amount of water that comes down the Sioux Valley. I know that the elevation of the land north of the spillway is about two and one-half to three feet to the mile from Thompson's bridge down to where it enters the present spillway. The amount of water shed varies very much. It would be pretty hard to tell the amount thereof.

(Re-direct Examination).

The channel of the Big Sioux River that passes through the city has been infringed on very much in the past twenty-five years; Since I came here in 1879—the river covered much more territory then than it does now and was very flat. When we got a heavy rain the stream flowed out and later would narrow down to a smaller stream again. During the years 1919 and 1920 the water in the river has been the highest that I can recall, and especially up around the city water plant and electric light plant, than at any time prior to that, since 1881; there has been no damage by high water to the city property since 1881; the Cascade Mill dam was built I think in, 1878; they were finishing it in the spring when I came here.

309 O. S. THOMPSON, called and sworn as witness testified as follows:

(Direct Examination)

I reside in Sverdrup Township and was born there in 1875 and have resided there ever since; about 10 miles north of Sioux Falls; I own 503 acres in the Big Sioux River Valley where I live; within the drainage district there is close to 300 acres; I have farmed my land myself since 1897 and was residing there when ditch No. 2 and also ditch No. 1 was constructed; I think ditch No. 1 was constructed in 1909 and ditch No. 2 was constructed the following year; ditch No. 2 starts about 1 mile northwest of Baltie; it starts right in the river at a point about 15 miles north of the spillway at the

penitentiary; from the point where ditch No. 2 starts to where it joins ditch No. 1 is about 11 1/2 miles; the length of ditch No. 1 is 3 1/2 miles; the width of ditch No. 1 at the top is about 90 feet; the top width of ditch No. 2 is 45 to 50 feet; it is possible that at the very north end it is down to forty feet; the average depth of ditch No. 2 is about 6 feet and of ditch No. 1 about 6 feet; the present spillway was finished in 1918; the old spillway was washed out in 1916; the present spillway is a little less than 12 feet in diameter; the intake of the spillway is the lower end of ditch No. 1 and is rip rapped, then there are two gates leading into a hole that [does] down through the ground about 40 feet; the shaft is perpendicular for about 40 feet; at the lower end of it a channel is run out towards the river towards the east sloping downwards so that it comes out just above the river level on the lower end; there was nothing that prevented all of the water that was gathered by these ditches No. 1 and No. 2 at the old outlet or spillway to prevent all of the water going over the hill; since the new spillway was put in, I have lost

more crops than I did before it was put in and after the
310 construction of ditches No. 1 and No. 2 my losses have
been considerably more since the new spillway was put
in than they were before it was put in and after the ditches
were constructed.

Defendants were thereupon given permission by the Court to make the witness their witness for the purpose of identifying certain exhibits and he thereupon testified in behalf of defendants as follows:

Defendants' Exhibit 2 is a petition to the County Board asking for the establishment of what is known as Covell Lake cut-off. The first signature attached thereto is mine. I signed that, and I had that presented to the County Board for the purposes set forth in the petition. I own land in the vicinity of Drainage Ditch No. 1 & 2 that is affected by that ditch. I evidently furnished the bond designated as Defendant's Exhibit.

Defendants' Exhibits 2 and 3 were offered and received in evidence as part of defendants' case.

J. WILLIAM LINK, called as a witness on behalf of plaintiff and sworn testified as follows:

(Direct Examination.)

My name is J. William Link; I reside in Chicago; I am a hydroelectric engineer employed at the present time by the

Byllsby Engineering & Managing Corporation; next February I will have been in its employ 12 years; my first experience in hydro-electric work was with the Missouri River Commission; I was with them for five years on the Missouri River Work; subsequent to that I was for five years on the Metropolitan Water Works in Boston; following that I was with the Niagara Falls Power Company for 4 years; I think it was; and then with the former resident engineer of that company, who opened an office for himself and I took charge

of his office for him for a year or 18 months; I then was 311 with the City of Columbus, Ohio, for two years; following that I was with the Long Soo Development Company of the St. Lawrence River for two years, and with the Passaic Valley Sewage Disposal Commission for three months; I then came with Byllsby & Co., and I have been with them ever since; I should say the experience I have outlined covers pretty well the field of hydroelectric engineering; I have had a good deal of experience in the designing and construction or superintendence of construction of hydroelectric plants and water plants, particularly plants for the generation of electric current; I have had experience in the installation and inspection of water wheels and water machinery; I have not had experience in the designing of water wheels; that is a specialty; I have installed that kind of work and written specifications for them and designed what kind of wheels should be installed, etc, since I have been with Byllsby interests; I have had complete charge of their hydro-electric plants in the different parts of the country; these plants are scattered pretty well over the country; we have 5 plants in Minnesota in the vicinity of the twin cities and southwest of there; we have two plants in Wisconsin; we have two plants in California; a plant in Oregon and a plant in Montana, and the plant here in Sioux Falls; I think that covers the water power plants pretty well; I have examined the drainage ditch and its course; I have made a study of the hydro-electric plant in this city operated by the Northern States Power Co.; that was constructed before my connection with the Byllsby interests; the Byllsby interests constructed that plant before they acquired it for other parties, the plant referred to being the hydro-electric plant in question here; I would call the construction of the plant very massive; I have investigated the stability of the dam, its capacity to

withstand flood waters, and after examining the whole 312 plant, I should say that it is particularly well designed and constructed to withstand floods or anything of that nature; the massive walls I speak of are of con-

crete material; I have made a study of the flood conditions in the valley of the Big Sioux River; my sources of information have been government reports and the information I have gleaned from newspaper accounts and talks with various parties who have been on the ground and know the floods; the nearest I can judge, according to the information I have obtained, the greatest flood that there is any record of in that valley was the flood of 1881; I think the design and construction of the plant down here would be sufficient to withstand the flood stages of 1881; I think it would do that if there were no spillway or drainage ditch because the plant was constructed before the spillway was, and so far as I can find out no account was taken of the spillway at all; independently of that, the nearest estimate that I could make of the [probably] volume of the flood of 1881, the dam would discharge that without even raising the water any higher than we carry it ordinarily; in my judgment, the company operating this plan would absolutely not be justified in the expenditure of any money for the construction of the drainage ditch, and spillway that has been talked about here on the basis of benefits to the plant in any way; it is my opinion that there is no appreciable benefit to the plant of the construction of the improvement out there.

(Cross Examination)

"Q. Mr. Link, you made for the County Commissioners of this county a hydro survey at one time, of this territory, did you not?

A. I don't think I made a survey.

313 Q. You made a report to the Board? A. Yes.

Q. And the data you testified about? Your attorney asked you on what data you based your opinion and you said upon government reports.

A. And some survey data taken by the Board's engineer.

Q. And you made a report as to the feasibility of this drainage project did you not?

A. The feasibility? In what way do you mean? I don't quite get your idea.

Q. That it was feasible from an engineering as well as a financial standpoint?

A. It was feasible to build it, yes."

In that report I stated that the maximum flood liable to occur in the reaches of the Big Sioux River under consideration which has this ditch construction, will probably not exceed ten thousand second feet. This condition was probably approximately as it existed in 1881; and that the floods which

occurred in the spring of the year 1916—the amount of water that came down the river and the ditch at that time did not exceed six thousand or six thousand five hundred cubic feet per second; it seems to be the amount of water that went through the old spillway [un] 1916 was 1400 cubic feet per second; I am not sure; I recommended to the Board that the spillway be constructed to take care of approximately 2500 cubic feet per second; in my judgment the amount of water that was carried down the Sioux Valley during the freshet of 1916 was approximately 6000 feet per second; that was the spring that the spillway washed out; I do not know that you call the 1916 flood an ordinary flood; I have not been able to find any record of flood stages in the river and I am not sufficiently familiar with the floods from year to

314 year to know whether that flood would be considered an ordinary flood or not; I would say that it was larger

than the ordinary flood; that is if by the ordinary flood you mean the intensity of flood that occurs most frequently; the amount of water that came down the Sioux Valley in the year 1881 is probably the maximum; I do not remember whether in that report I recommended to the Board that the opening which had occurred at what we have been calling Scholtz, about 3 miles north of town, a dam be placed in there to keep the river in its old channel and to keep it from coming down through the ditch; I would recommend it; at the time you made the report as representative of H. M. Bylls-Co., Byllsby & Co. manage the Northern States Power Co., but it isn't the same company by any means, we do the managing for the Northern States Power Co.

315 (Redirect Examination)

Q. From your examination of that region up there at the time you made the report as representative of H. M. Byllsby, I wish you would tell the court what that ditch and improvement is with regard to lands down here in the city and particularly in regard to the region down about the Northern States Power Co. property; what is the proper term for it?

A. It acts as a flood water bypass; there is no drainage; by flood water bypass I mean that it takes flood waters out of the river and passes them around and back in again; it relieves flood water conditions a certain small extent in certain stages of the river; I would say that that ditch is not a drainage at all in this section down here; in my judgment the power plant of the Northern States Power Co. as now constructed would be sufficient to withstand a flood equal to the flood of 1881; as I stated before I would think it would pass such a flood without raising the water higher in the

dam than we ordinarily carry by means of flash boards; those flash boards would be removed at times of floods; the Bennett dam was destroyed under my supervision; it was destroyed to get advantage of more head water or units that head with ours in one plant.

316

(Recross Examination)

This bypass of the water I have mentioned would tend to relieve the Sioux River from the point where it took the water from the river to where it deposited it back in the river; it would relieve the river of the amount it carried.

Q. Doesn't that ditch up through there also drain agricultural lands?

A. As I saw it when I inspected it, I should say to very small extent as I understand drainage; there were only 3 or 4 inlets I could see where the farmers could take advantage of the drainage.

(Redirect Examination)

If I were designing a hydro-electric plant on the present site of the plant here today, knowing that the ditch and spillway had been constructed and are there as they are, as I know the ditch and its history, I would not take the ditch and spillway into consideration at all in the designing that plant, particularly with a view to resistance to floods or possible floods.

317 A. G. RISTY, recalled and examined by the Court, testified as follows:

The northern end of this ditch No. 1 and 2 was one mile north of Baltic; the end of the ditch opens into the Sioux River; there are no artificial laterals; if there are heavy rains on the lands adjoining this ditch which runs north and south in a general direction that flood the lands on either side of it, it is the intent and purpose that the ditch shall take care of such flood waters.

Q. How will it get into the ditch?

A. It slightly slopes into the ditch.

Q. How could it get over the embankment without laterals?

A. There are pipes at certain places to let the water in through the embankment into the ditch, and that you can adjust running out into the farm lands; there are pipes here and there along the ditch to let waters in when the bottom lands overflow, and it has also been proven that these ditches drain the bottom lands, because there are farms all along

and it has lowered the water in their wells to a very considerable extent since the ditch was dug, so it shows it drains the lands; they propose to have gates in the embankment so that when the pressure was from the inside it would close the gates and if the pressure came from the outside it would open them within this service pipe.

Q. Then the real purpose of this ditch as I understand it is to take the water from the Sioux River in flood times and conduct it down to the spillway and into the river at the mouth of the spillway.

A. And preventing the overflow to a great degree from spreading over the farm lands.

Q. And the purposes of the ditch, the effects that 318 the ditch is to perform, the thing that you intended when you were contracting was that it should be an [auxiliary] to the river to relieve it of the surplus flood water?

A. If the Court please, I was not on the Board when the ditch was constructed; only when we repaired the spillway, it has been my understanding always that it was to help carry off the flood waters.

Q. It is rather to take the water from the river at its maximum capacity and thus relieve the river of that water rather than to drain the lands along the sides; in other words, it is to keep them from being overflowed with this water?

A. That has always been my understanding.

Plaintiff rests.

Motion to Dismiss

The Counsel:

At this time, Your Honor, at the close of the plaintiff's cases in chief, the defendant renews the motion to dismiss the bills of complaint in these actions and set aside the restraining order heretofore issued, for all the reasons and upon the grounds urged in the motion made at the opening of these cases.

And for the further reason that the record now shows that notice of an opportunity to be heard upon the amount or proportion of benefits these plaintiffs have received and the amount or proportion of assessment that will be made against their property for such benefits, has been given to them and the plaintiffs in these cases have a plain, adequate and speedy remedy at law.

For the further reason that the record now shows that the method of apportionment of benefits and assessment to be made thereon as provided by the laws of South Dakota and applied by the Board of County Commissioners in these cases,

319 based upon their judgment of values and benefits conferred to the property of these plaintiffs in these cases and others, is a standard method of apportionment which will probably produce substantial justice generally, and the probability is that the parties will be taxed proportionately to each other and all others upon whom benefits are conferred, by the method provided and employed as shown by the evidence in these cases, and will probably produce approximately correct general results.

For the further reason the record now shows the Board of County Commissioners of Minnehaha County, charged by the law of this State with the execution of the provisions of the drainage ditch law, has jurisdiction to proceed in respect to the property within said drainage area including the property of the plaintiffs in these actions, and if there have been any errors in the administration of the statute, the same do not involve the jurisdiction of that tribunal over the property of these plaintiffs or otherwise, and the record does not indicate upon its face any gross departure from the requirements of the statute, therefore this Court cannot inquire into these collateral proceedings, and the same are not questions presenting a federal question.

The Court: The motion is denied pro forma.

The defendants, to maintain the issues on their part, called as a witness F. L. BLACKMAN, who being duly sworn testified in substance as follows: My name is F. L. Blackman. I resided in the city of Sioux Falls on July 15, 1916, and at that time had property within the drainage area of Drainage Ditch No. 1 & 2. Defendants' Exhibit 10 being a petition dated July 15, 1916, addressed to the Board of County Commissioners of Minnehaha County, South Dakota, signed by the City and others, the name of F. L. Blackman appearing thereon, was signed by me.

320 GEORGE W. BURNSIDE, in behalf of defendants, being duly sworn, testified:

"As mayor of the City of Sioux Falls, I signed defendants' Exhibit 10, being a petition addressed to the board of County Commissioners of Minnehaha County, dated July 15th, 1916;

at a special meeting of the city commission, they decided to ask the County Commissioners to protect the destruction of the drainage ditch in order to protect our water plants.

F. E. WARD, being recalled as a witness on behalf of the defendants, testified in substance as follows:

Defendants' Exhibits 10 to 32, inclusive, are records and files in my office as County Auditor of Minnehaha County, with reference to the establishment of Drainage Ditch No. 1 and 2. Defendants' Exhibit 10 is the petition of the City of Sioux Falls, F. L. Blackman, et al, for the establishment and construction of Drainage Ditch No. 1 and 2. Defendants' Exhibit 11 is the bond accompanying and filed with the petition. The material portion of said Bond, being defendant's exhibit 11 is as follows:

“Bond on Petition for Drainage.

Whereas, the parties whose names are signed hereto have prepared and executed and intend to present to the Board of County Commissioners of Minnehaha County, South Dakota, a petition to reconstruct and improve drainage ditches Number 1 and 2, in Minnehaha County, South Dakota, and to construct a new spillway or outlet to the said drainage ditches numbered 1 and 2, and to pay therefor by an assessment upon the property, persons and corporations benefited thereby, a copy of which petition is hereto attached marked

Exhibit “A” and made a part hereof.

321 Now, Therefore, we F. L. Blackman, E. D. Clark, W. Brady, Dan Donahoe, Den Donahoe, W. M. Donahoe, Catherine Peck, Porter P. Peck, Mary Brace, John P. Bleeg, Frances G. Carpenter, McKinney & Allen, as principals, and Inter State Surety Company as surety, do hereby undertake, promise and agree to and with the County of Minnehaha, of the State of South Dakota, that we will pay all expenses incurred in case the Board of County Commissioners of said County do not grant said petition, or in case the said petition is denied on appeal.

F. L. Blackman, E. D. Clark, W. Braley, Den Donahoe, Dan Donahoe, W. M. Donahoe, Catherine Peck, Porter P. Peck, Mary C. Brace, John P. Bleeg, Frances G. Carpenter, McKinney & Allen, Inter State Surety Company, by A. B. Fairbank, Its Attorney in Fact.

This bond approved August 1, 1916, Harry H. Howe, County Auditor.

Defendants' Exhibit 12 is the order of the Board of County Commissioners for filing said petition and bond. Defendants Exhibit 13 is a letter of transmittal of said petition with reference to Drainage Ditch No. 1 and 2, to the State Engineer at Pierre, the material portions of which are as follows:

"August 4, 1916.

Homer M. Doerr, State Engineer,
Pierre, South Dakota.

Dear Sir:

I enclose herewith new drainage petition with reference to Drainage Ditches Numbers 1 and 2 and the spillway thereof, which have been ordered filed and transmitted to you. It is the especial wish of the County Commissioners that you view this drainage proposition with them at your earliest convenience, as it is necessary that this improvement be made soon, so as to avoid further damage. The parties have agreed to abandon the Covell's Lake extension terminus, in case the drainage proposition is established in accordance with this petition, or a modification thereof.*****

Please give this matter your immediate attention, and advise as to when you can view this drainage proposition with the Commissioners.

Yours truly,

EOJ:M
Enc.

County Auditor."

Defendants' Exhibit No. 14 are the minutes of the Board of County Commissioners of August 3, 1916, of adjournment from that date to August 14, 1916. Defendants' Exhibit 15 are the proceedings of the Board of County Commissioners, under date of August 14, 1916. Defendants' Exhibit 16 is the resolution of Board of County Commissioners for a survey of the territory to be drained by Drainage Ditch No. 1 and 2. Defendants' Exhibit 17 is the Surveyor's Report, the material portions of which are as follows:

"Report of Preliminary Survey of Said Proposed Drainage Ditch for the Territory now Partially Covered by Drainage Ditches Numbers 1 and 2, Sioux Falls, South Dakota.

To the Honorable Board of County Commissioners, Minnehaha County, South Dakota:

In accordance with the resolution of your Honorable Board dated August 14th, 1916, authorizing and directing a survey of the proposed drainage of the territory covered by drainage ditches numbers 1 and 2, as now established, and directing that the exact line or lines of said proposed drainage be established under the supervision of the State Engineer, I took up the work, and, as per your request, file here-
323 with a limited report of the survey of such territory showing the exact line of the proposed drainage ditch as follows, to-wit:

Section One

Commencing at a point 58 feet West and 1035 feet North of the Southeast Corner of Section 29, Township 102, Range 49, West of the 5th P. M., running thence South *****, the said line being the center line of said drainage ditch, and is intended to cover the exact location of drainage ditch number one as now established and constructed.

Section Two.

Commencing at a point 1035 feet North and 58 feet West of the Southeast Corner of Section 29, Township 102, Range 49, the same being the commencement point of Section 1, hereinbefore described, running thence North *****.

Section Three.

Commencing at a point 1640 feet East of the center of Section 18, Township 103, Range 49, running thence North , the said line being the center line of said proposed drainage.

That in addition thereto, the Big Sioux River is to be straightened in Sections 17, 18 and 20, Township 103, North of Range 40, in order to afford better means of communication between the lower end of Section 3 of said ditch, and the upper end of Section 2 thereof, the same being intended to cover the exact location of drainage ditch number 2, as now established and constructed.

I further recommend that the Big Sioux River be straightened.*****.

All of the above cut offs to have a bottom width of 60 feet, and side slopes of one and one-half to one. A right-of-way 100 feet in width and one-half each side of the above described center lines will be required. The plans and speci-

324 fication for the proposed spillway on Section 9, of Township 101, Range 49, will be furnished later.

Dated this 13 day of September, A. D. 1916.

Respectfully submitted, L. E. Stevens, Deputy State Surveyor. Filed in the office of the Auditor of Minnehaha County, S. D. this 13 day of September, 1916, Harry H. Howe, County Auditor, by E. H. Shenkle, Deputy.

Defendants' Exhibits 18 and 19 are the proceedings of the Board and the resolution of the Board fixing the exact line and width of Drainage Ditch No. 1 and 2, of September 13, 1916. Defendants' Exhibit 20 is the drainage ditch notice for Drainage Ditch No. 1 and 2. Defendants' Exhibit 21 is the affidavit of publication of drainage ditch notice, the material portion of which is as follows:

“Affidavit of Publication

C. L. Dotson, being first duly sworn, deposes and says: That he is a resident of the County of Minnehaha and State of South Dakota; that the Sioux Falls Press is a Daily Newspaper of general circulation, printed and published in the City of Sioux Falls, in said County and State, by C. L. Dotson, and is now and has been such newspaper continuously during all the times hereinafter mentioned; that the affiant is and was during all the time hereinafter mentioned, the publisher of said newspaper and in charge of the advertising department thereof, and has personal knowledge of all facts stated in this affidavit, and that the notice and advertisement headed Drainage Ditch, a printed copy of which is hereunto attached, and made a part hereof, was printed and published in the said newspaper for issues.

That the first publication of said notice in said newspaper aforesaid was on Saturday, the 16th day of September, A.

325 D. 1916, and that the succeeding publications were severally on Saturday, the 23rd day of September A.

D., on Saturday, the 30th day of September, A. D. 1916; that the fees charged for the printing and publication of said notice and advertisement in said newspaper, as aforesaid, were dollars and cents, and for this affidavit, Twenty-five cents, and that the said fees for the printing and publishing of said notice and advertisement and for this affidavit, as aforesaid, have been fully paid; that the full amount of the fee charged for the publishing of the said attached and annexed notice and advertisement inures

to the benefit of the publishers of the Sioux Falls Press; that no agreement or understanding for the division thereof has been made with any other person, and that no part thereof has been agreed to be paid to any person whomsoever. That the said newspaper is a legal newspaper, as provided in Session Laws of 1903, and amendments thereto..... Filed in the office of the Auditor of Minnehaha County, S. D., this 30th day of Sept. 1916 Harry H. Howe County Auditor.

The material portion of which certificate of posting Drainage Ditch Notice, is as follows:

'I, Jerry Carleton, Sheriff of Minnehaha County, South Dakota, do hereby certify that on the 21 day of September, A. D. 1916, I posted three copies of the annexed Notice in three public places near the route of the proposed drainage mentioned therein, as follows, to-wit: One on the bridge on North Minnesota Avenue crossing Drainage Ditch Number One, in the City of Sioux Falls; one on the bridge in Berwick's Addition to the City of Sioux Falls, crossing Drainage Ditch Number One near Fifth Avenue; and one on the bridge crossing Drainage Ditch Number One on Section 29 in Mapleton Township; that I also posted one of said copies at the South Front Door of the Court House in the City of Sioux Falls, all in Minnehaha County
326 Filed in the office of the Auditor of Minnehaha County, S. D. this 23 day of Sept., 1916, Harry H. Howe, County Auditor.'

Defendants' Exhibit 23 are the minutes of the Board of County Commissioners in relation to Drainage Ditch No. 1 and 2, of October 2 and 3, 1916, the material portions of which are as follows:

"October 2, 1916.

At the meeting in the County Court room, the Commissioners listened to arguments presented by those in favor of the drainage ditch, and the straightening of the Big Sioux River, and also to arguments against the straightening of said Big Sioux River, there being no objection to the establishment and construction of the main ditch project. The State Engineer, Homer Derr, recommended that the main drainage ditch, as petitioned for, be established and constructed with proper controlling gates and a sufficient spillway.

Claims for damages were filed as follows:

Kittery Realty Company	\$2000.00
Margaret Finnegan	1000.00
James L. Finnegan	8000.00

The whole afternoon was taken up in the discussion of the drainage project, and the suggested straightening of the Big Sioux River. At the hour of five o'clock P. M. an adjournment was taken until ten o'clock A. M. on Tuesday, October 3, 1916."

"October 3, 1916.

Pursuant to adjournment, the Board convened at ten o'clock A. M., and in company with the State Engineer, Homer Derr, visited the site of the proposed spillway and control gate, at the head thereof. The Board then returned to the Commissioners' Room, and held a conference with the State Engineer with reference to said proposed drainage. Mr. C. T. 327 Charnock then moved the adoption [—] the resolution establishing said drainage, and that the vote be taken by districts. Mr. J. E. Johnson seconded the motion. Upon roll call,

A. G. Risty, District No. 1 voted yes.

J. E. Johnson, District No. 2 voted yes.

J. L. Fritz, District No. 3, voted yes.

C. T. Charnock, District No. 4, voted yes.

J. A. Jensen, District No. 5, voted yes.

The Chairman then declared the resolution adopted. The State Engineer was then requested to prepare and submit plans and specifications for the necessary spillway and control, or headgates, at his earliest convenience. * * * *

Mr. C. T. Charnock moved that the hearing on damages occasioned by the establishment of Drainage Ditch No. 1 and 2, be adjourned until Friday, October 6, 1916, at ten o'clock A. M., and be made a special order for that date. Motion seconded by J. A. Jensen, and carried unanimously."

Defendants' Exhibit 24 is the resolution of the Board of County Commissioners establishing Drainage Ditch No. 1 and 2 upon the petition of the City of Sioux Falls, F. L. Blackman, et al. Defendants' Exhibit 26 are the minutes of the Board of County Commissioners for October 6, 1916. De-

fendants' Exhibit 27 is a resolution of the Board of County Commissioners of October 6, 1916, assessing damages as compensation for lands taken in the construction of Drainage Ditch No. 1 and 2, the material portions of which are as follows:

"Drainage Ditch No. 1 and 2.

Resolution Assessing Damages.

Whereas, the matter of assessment of damages caused by the establishment and construction of Drainage Ditches No. 1 and 2, was, on Tuesday, October 3, 1916, at a regularly adjourned meeting of the Board, deferred to and made a special order for Friday, October 6, 1916, at ten o'clock A. M.,

and the Board having met on said last named date, 328 and having heard and considered the claims for damages,

and having taken into consideration the fact that the principal portion of said drainage ditch has already been constructed, and assessments for damages therefor having already been made and paid in the original construction of said Drainage Ditches No. 1 and 2, and that the principal part of the work to be done consists of building a proper spillway, flood or control gates, cleaning deepening and widening the channel of the said drainage ditches as now constructed, building levees and dikes where deemed advisable, and other improvements to said drainage system:

Now, Therefore, Be It Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the damages arising from the establishment of Drainage Ditch No. 1 and 2, including compensation for the lands to be taken for said drainage, be and they are assessed and awarded as follows, the same being in accordance with plats thereof, filed in connection with the original construction of Drainage Ditches No. 1 and 2:

To the Kittery Realty Company, for damages to Tract One (1), etc. * * * *

Be It Further Resolved, that it is the judgment and determination of this Board that in consideration of the fact that damages were assessed and paid in the original construction of Drainage Ditch No. 1 and Drainage Ditch No. 2, for all damages sustained by each tract of land, or other property, through which the said drainage ditches and the present drainage ditch pass, as damages and compensation for the land taken by the route of such drainage, that no damages will accrue, or should be paid, by reason of the establishment and construction of said Drainage Ditch No. 1 and 2, except

as hereinbefore provided, and that the claim of Margaret Finnegan and James L. Finnegan for damages by reason of the recommended straightening of the Big Sioux River, which straightening has not been considered and determined, be and the same are hereby disallowed, without passing upon the merits of said claims, in case it is determined to straighten said Big Sioux River, and said claims are refiled, and that no other damages will accrue to any person or property by reason of the establishment and construction of said Drainage Ditch, except as herein awarded.

Be It Further Resolved that a fund to be known as "Drainage Ditch No. 1 and 2 Fund", be and it is hereby established, and that the proceeds of any assessment, or assessments, hereafter to be made in this proceeding be and they are hereby pledged to such fund, and when such assessments are collected, it is ordered and directed that they be deposited to the credit of such fund, to be applied in the payments of the warrants to be issued on such fund, in the order of the registry of such warrants with the County Treasurer. It is ordered that the warrants to be issued on such fund draw six per cent., interest from date of issue. It is further ordered that, if any of the persons entitled to damages under this resolution will accept a warrant or warrants on such fund in lieu of money, then that warrants on such fund for the proper amounts be issued therefor to the persons entitled thereto, to be signed by the Chairman and countersigned by the Auditor, but if any person or persons will not accept a warrant upon such fund in payment of the damages herein awarded, then the Chairman of this Board, and the Auditor, are authorized to issue warrants on such fund, in such sums as may be found advisable, and to sell the same at not less than par, and out of the proceeds thereof, to pay the damages herein awarded, taking the receipts of the persons entitled thereto therefor. It is further ordered that all expenses in connection with said Drainage Ditch No. 1 and 2, hereafter to be incurred up to the time of the letting of the contract for the construction of said ditch, be paid by warrant upon such fund.

330 Be It Further Resolved that in case any person herein awarded damages will not accept the same, the Chairman of the Board is directed to tender him the amount thereof, and in case of his non-acceptance thereof, to deposit the same in the Sioux Falls, South Dakota, to the

credit of such person, and to give such person notice of such deposit.

Approved this 6 day of October, A. D. 1916, by the Board of County Commissioners of Minnehaha County, South Dakota.

By A. G. Risty, Chairman."

Attest:

County Auditor.

Defendants' Exhibit 28 are minutes of the Board of County Commissioners of December 16, 1916, relative to Drainage Ditch No. 1 and 2, passing a resolution fixing the exact line and width of drainage ditches straightening the Big Sioux River, as a part of Drainage Ditch No. 1 and 2, and fixing the time and place for hearing thereon, and defendants Exhibit 29 in said resolution, the material portions of which are as follows:

"Resolution.

Whereas, on September 3, 1916, this Board, by resolution duly adopted, established Drainage Ditch No. 1 and 2, but expressly reserved for further consideration and determination the question of the straightening of the Big Sioux River at the several points recommended in said Engineer's report, without passing upon the merits thereof, for some later date when the straightening of the Big Sioux River will be given more complete consideration covering the points recommended and other points requested at the hearing; and

Whereas, the Engineer, L. E. Stevens, has filed his supplemental report with reference to the straightening of the Big Sioux River, recommending narrower ditch than previously recommended, also recommending the extension of the straightening of the said Big Sioux River, and thereby varying the route of said drainage, together with maps and profiles; and

Whereas, the Board has personally inspected the route of said proposed drainage, as described in said petition for Drainage Ditch No. 1 and 2, and as described in said Engineer's reports;

Therefore, Be It Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, that the route and width of the ditch straightening the Big Sioux River, as a part of Drainage Ditch No. 1 and 2, be and the same is hereby fixed as described in said Engineer's original

report, as amended by his supplemental report, and that the requisite right-of-way of said drainage ditch and dump space, be and the same is hereby fixed as described in said Engineer's report; and

Be It Further Resolved that it is deemed practicable and necessary to vary the route of said drainage occasioned by the proposed straightening of the said Big Sioux River, so that it will pass through other lands than those described in the original notice of hearing; and

Be It Further Resolved that the further consideration and hearing of said matter be adjourned to Saturday, the 30 day of December, A. D. 1916, at ten o'clock A. M., at the office of the County Auditor of said County, in the City of Sioux Falls, South Dakota, and the same is hereby fixed as the time and place for the hearing of the said petition with reference to the straightening of the said Big Sioux River, as recommended in the said Engineer's original and supplemental reports, and that notice thereof be given in accordance with the provisions of Section 4, 5 and 28, of Chapter 138 of the Laws of 1907, as amended by Chapter 102 of the Laws of 1909 of the State of South Dakota. * * * * *

332 Defendants' Exhibit 30 is a notice of hearing on the Sioux River cut-offs on Drainage Ditch No. 1 and 2, the material portions of which are as follows:

"Drainage Ditch Notice.

Sioux River Cut-offs on Drainage Ditch 1 and 2.

Notice is hereby given that Saturday, December 20, A. D. 1916, at ten o'clock A. M., at the office of the County Auditor of Minnehaha County, South Dakota, has been fixed by the Board of County Commissioners of Minnehaha County, as the time and place for the hearing of the petition of the City of Sioux Falls, F. L. Blackman, W. Braley and others, filed August 3, 1916, for the establishment and construction of a, drainage ditch pursuant to the provisions of Chapter 134 of the Laws of 1907 of the State of South Dakota, as amended by Chapter 102 of the Laws of 1909, insofar as said petition refers to the straightening of the Big Sioux River, as prayed for in said petition, and as recommended by the Engineer's original and supplemental reports. The consideration whereof having been deferred for further consideration, when Drainage Ditch No. 1 and 2 was established, and said meet-

ing having been adjourned for that purpose. The exact line and width of said ditch was determined by the action of said Board on December 16, 1916, and in general terms is as follows: * * * *

The tract of country likely to be affected by the establishment and construction of said proposed cut offs in the Big Sioux River is in general terms described as all of the lands and property affected by the construction of Drainage Ditch No. 1 and 2, as established by resolution in these proceedings under date of October 3, 1916, and of record in the office of the

County Auditor of Minnehaha County, South Dakota.

333 The separate tracts of land through which said proposed drainage will pass, and part of which will be required therefor, and for dump space, and the names of the owners of said tracts, as appears from the records in the office of the Register of Deeds of Minnehaha County, South Dakota, on August 3, 1916, that being the time of filing said petition, are as follows: * * * *

(Note. Plaintiff is not named nor is any of its property described in this notice.)

All persons affected by said proposed drainage are hereby summoned to appear at said hearing and show cause, if any they have, why the said drainage should not be established and constructed, and all persons deeming themselves damaged by said proposed drainage, or claiming compensation for the lands proposed to be taken for said drainage, are hereby summoned to, present their claims therefor at said hearing.

Reference is hereby made to the files in said proceedings for further particulars.

Dated this 16 day of December, A. D. 1916.

BOARD OF COUNTY COMMISSIONERS OF MINNEHAHA COUNTY, SOUTH DAKOTA,
By A. G. Risty, Chairman."

Attest:

Harry H. Howe,
County Auditor.

(Seal)

Defendants' Exhibit 31 is the certificate of posting the aforesaid notice, the material portion of which is as follows:

"I, Jerry Carleton, Sheriff of Minnehaha County, South Dakota, do hereby specify that on the 20 day of December, A. D. 1916, I posted three copies of the annexed notice in three places near the route of the proposed drainage mentioned therein, as follows, to-wit:

One on the bridge over the Sioux River between Sections 29 and 32, in Mapleton Township; One on the bridge over the Sioux River on the North Half of Section 8, in Mapleton Township, and one on the bridge over the Sioux River between Sections 29 and 32, in Sverdrup Township; that I also posted one of said copies at the South Front Door of
334 the Court House in the City of Sioux Falls, South Dakota, all in Minnehaha County, South Dakota. * * * *

Defendants' Exhibit 32-A is the affidavit of publication of the aforesaid notice, the material portion of which is as follows:

"C. L. Dotson, being first duly sworn deposes and says: That he is a resident of the County of Minnehaha and State of South Dakota; that the Sioux Falls Press is a daily newspaper of general circulation; printed and published in the City of Sioux Falls, in said County, and State, by C. L. Dotson, and is now and has been such newspaper continuously during all the times hereinafter mentioned; that the affiant is and was during all the time hereinafter mentioned, the publisher of said newspaper, and in charge of the advertising department thereof, and has personal knowledge of all the facts stated in this affidavit, and that the notice and advertisements headed Drainage Ditch Notice No. 1 and 2, a printed copy of which is hereunto attached and made a part hereof, was printed and published in said newspaper for issues. That the first publication of said notice in said newspaper aforesaid, was on Wednesday the 20th day of December, A. D. 1916, and the succeeding publications were severally, on Wednesday, the 27 day of December, A. D. 1916. That the fees charged for the printing and publication of said notice and advertisement in said newspaper as aforesaid, were Ten Dollars and cents, and for this affidavit, Twenty-five Cents, and that the said fees for the printing and publishing of said notice and advertisement, and for this affidavit as aforesaid, have been fully paid; that the full amount of the fee charged for the publishing of the said attached and annexed notice and advertisement, inures to the benefit of the publishers of the Sioux Falls Press; that no agreement or

335 understanding for the division thereof has been made with any other person, and that no part thereof has been agreed to be paid to any person whomsoever. That the said newspaper is a legal newspaper as provided in Session Laws of 1903, and amendments thereto. * * * *

The defendants' Exhibit 32 is the minutes of the Board of County Commissioners of August 10, 1917, adjourning said hearing until August 11, 1917, at which time the Board passed a resolution establishing said river cut-offs, a material portion of which resolution is as follows:

"Commissioners' Proceedings.

August 10, 1917.

Pursuant to resolution of July 27, 1917, adjourning and fixing the time of hearing upon the straightening of the Big Sioux River, under the petition upon which Drainage Ditch No. 1 and No. 2 was established, all members of the Board being present, and a delegation of farmers and property owners interested, Engineer L. E. Stephens having made and filed his report of the exact line and location of the several cut offs suggested and recommended, and the Board having heard the protests of those objecting thereto, and the petitioners in like manner having been heard, and the Board having heard the argument of counsel thereon, the further consideration thereof was adjourned to August 11, A. D. 1917, at two o'clock P. M."

"Commissioners' Proceedings.

August 11, 1917.

Pursuant to adjournment, The Board of County Commissioners convened at two o'clock P. M. All members of the Board being present, and after taking up and considering the project of straightening the Big Sioux River upon the petition for the establishment of Drainage Ditch No. 1 and 2, heretofore established, and the Board being fully advised 336 with reference thereto, it was moved by C. T. Charnock, and seconded by J. A. Jensen, that the following resolution be adopted:

Be It Resolved by the Board of County Commissioners of Minnehaha County, South Dakota, pursuant to the resolution of this Board of October 3, 1916, establishing Drainage Ditch No. 1 and 2, and reserving the consideration and de-

termination of the question of the straightening of the Big Sioux River at several points recommended in the Engineer's report, that it is the determination of this Board that it will be conducive to the public health, convenience and welfare, and that it is necessary and practicable for the drainage of agricultural lands within the drainage area of said drainage ditch No. 1 and 2; that the hereinafter described ditches straightening the Big Sioux River be established and constructed as a part of the drainage system hereinbefore established, and designated as Drainage Ditch No. 1 and 2.

Be It Further Resolved that the said ditches straightening the said Big Sioux River be, and the same are hereby established, with a bottom width of 20 feet; and a depth not to exceed the depth of the main channel of said Big Sioux River, with a right-of-way for ditch and dump space of 100 feet, one-half on each side of the center line along the lines of herein-after and particularly described as follows. * * * *

All of the foregoing Exhibits were offered and received in evidence.

Mr. Ward, as County Auditor of Minnehaha County, identified Defendants' Exhibits 2 and 3, and 33 to 42, both inclusive, as records and files of his office in relation to this drainage ditch proceeding, all of which were offered and received in evidence.

Defendants' Exhibit 2, being a petition signed by O. S. Thompson et al, to abandon the outlet of old Drainage Ditch No. 1 and for the establishment of a new outlet thereto, the material portion of which is as follows:

337 "To the Honorable Board of County Commissioners of Minnehaha County, South Dakota:

The undersigned petitioners respectfully represent that they are all residents of the County of Minnehaha, South Dakota, and that each of them is the owner of certain lands situated in said County, in the Valley of the Big Sioux River, all of which lands will be affected by the drainage herein mentioned and proposed.

Your petitioners further represent that it is necessary for the drainage of agricultural lands in the said Big Sioux River Valley, including all of the lands affected by Drainage Ditches No. 1 and 2, as the same have been established and constructed, that said ditches be repaired and put in proper con-

dition and that the same be cleaned, deepened and widened, and that the Levees, dikes and barriers thereof be remodeled, reconstructed and repaired in such places and to such extent as may be necessary in order for said ditches to carry off the surplus water and properly drain the lands affected thereby;

That it is also necessary to permanently close said Ditch No. 1 above the present spillway, or outlet, thereof, at a point in the Northeast quarter of the Southeast quarter of Section 5, in Township 101, of Range 49, where the course of said ditch as now constructed turns from a Southerly direction to a Southeasterly direction, and to extend said ditch from such point, running thence in a Southwesterly direction, through Covell's Lake in the City of Sioux Falls, across the Southeast quarter of Section 5, the East Half of the Southwest Quarter of Section 8, the West Half of Section 17, the East Half of the Southwest Quarter of Section 18, all in said Township and Range, terminating at a point on the Big Sioux River

in the Southwest Quarter of Section 18, about 40 rods
338 north of the bridge across said river commonly known
as the "12th Street Bridge", situated on the section
line between said Section 18 and Section 19.

Your petitioners further represent that the proposed maintenance and repair of said drainage ditches No. 1 and 2, and the extension of said Ditch No. 1, are necessary for the reasons that the present spillway and outlet of said Ditch No. 1, as now constructed and used, is impracticable for the purpose for which it was intended, and if allowed to remain in its present condition, will probably cause large damage to the owners of property adjacent thereto and affected thereby; that it is impossible to put said spillway or outlet in a condition to carry off the surplus water and properly drain the lands affected by said drainage ditches, without causing great damage to the owners of property as aforesaid; that for these reasons it is necessary to establish and construct a new outlet for said drainage ditches, which can be done by establishing and constructing the extension herein proposed.

Your petitioners further represent that the proposed repair and maintenance of said Drainage Ditches No. 1 and 2, and the establishment and construction of said proposed extension of or outlet to Drainage Ditch No. 1 will be conducive to the general health, convenience and welfare of the City of Sioux Falls, and of the inhabitants of the Big Sioux River Valley between the Cities of Sioux Falls, and Dell Rapids, and will prevent the annual loss of many thousand

acres of crops in said valley, and will prevent great damage to the lands in said territory, and to the buildings bridges, highways and other improvements thereon.

Your petitioners further represent that the territory likely to be affected by the proposed repairs to and maintenance of said drainage ditches, and the establishment and construction of the proposed extension to or outlet of said

339 drainage ditch No. 1 includes all of the lands in said

Big Sioux River Valley that are affected by said Drainage Ditches No. 1 and 2, as the same have been established and constructed, and all of the lands in said valley between the cities of Sioux Falls and Dell Rapids that are subject to overflow by the Big Sioux River.

O. S. Thompson, Gunerius Thompson, Charles Kaufmann, O. O. Gilseth, Ben Mekvold."

Defendants' Exhibit 3, being the bond accompanying the petition of O. S. Thompson, the material portion of which is as follows:

"Whereas, O. S. Thompson, Gunerius Thompson, Charles Kaufmann, O. O. Gilseth and Ben Mekvold have prepared and executed, and intend to present to the Board of County Commissioners of Minnehaha County, South Dakota, a petition for drainage, a copy of which is hereto attached, marked Exhibit "A", and made a part hereof;

Now, therefore, We, O. S. Thompson, Gunerius Thompson, Charles Kaufmann, O. O. Gilseth and Ben Mekvold, as principals, and R. J. Huston and Iver R. Peterson, as sureties, do hereby undertake, promise and agree to and with the County of Minnehaha, in the State of South Dakota, that we will pay all expenses incurred in case the Board of County Commissioners of said County do not grant said petition, or the same is denied on appeal.

Dated at Sioux Falls, South Dakota, April 8th, 1916.

O. S. Thompson, Gunerius Thompson, Charles Kaufmann, O. O. Gilseth, Ben Mekvold, R. J. Huston, Iver R. Peterson.

I hereby approve the foregoing bond and the sureties thereto.

HARRY H. HOWE, County Auditor."

340 Defendant's Exhibit 33, being the order for filing the petition of O. S. Thompson, et al, the material portions of which are as follows:

"Order for Filing Petition for Drainage.

Whereas, O. S. Thompson, and others, of the County of Minnehaha, South Dakota, have this day presented to this Board a petition for the drainage of lands in the Big Sioux River Valley, which lands have heretofore been drained by drainage ditches Nos. 1 and 2, as hereinbefore established and constructed, in which said petition is represented that it is necessary to permanently close said drainage ditch No. 1, above the present spillway or outlet thereof, at a point in the Northeast quarter of the Southeast Quarter of Section 5, in Township 101, Range 49, where the course of said ditch as now constructed turns from a Southerly direction to a South-easterly direction, and to extend said ditch from such point running thence in a Southwesterly direction through Covell's Lake in the City of Sioux Falls, and across the Southeast Quarter of Section 5, the East Half and the Southwest Quarter of Section 8, the West Half of Section 17, the East Half and the Southwest Quarter of Section 18, all in said Township and Range, terminating at a point on the Big Sioux River in the Southwest Quarter of said Section 18, about forty rods North of the bridge across said river, known as the Twelfth Street Bridge, situated on the Section line between Sections 18 and 19, all in said Township and Range, and said petition having been by this Board examined, and being found sufficient in form, and being accompanied by a proper bond, with sureties approved by the County Auditor:

Now, Therefore, It Is Ordered by the Board of County Commissioners of Minnehaha County, South Dakota, that said petition be forthwith filed with the County Auditor, and a copy thereof be transmitted by said County Auditor
341 to the State Engineer."

Thereafter, on April 12, 1916, a copy of said petition was transmitted to the State Engineer at Pierre, South Dakota, and on May 3, 1916, a resolution was passed by the Board ordering a survey to be made for this proposed extension, and ordering the surveyor to report to the Board upon the length, size, width and depth of the ditch required for this proposed outlet. On May 24, 1916, the surveyor reported his survey, the exact line and width of the ditch, and the amount of right-of-way, together with the estimated cost of the same, and on June 9, 1916, the Board of County Com-

missioners, by resolution, fixed the exact line and width of the proposed outlet of Drainage Ditch No. 1 and designated the time and place for hearing the same, and designated June 29, 1916, as the time of hearing thereon, and ordered notice to be given. [One] June 10, 1916, notice dated on that day was published and posted as required by law.

Defendants' Exhibit 42 is the resolution of the Board establishing a drainage ditch as an outlet of Drainage Ditch No. 1 and the abandonment of the old outlet of Drainage Ditch No. 1, and the repair of Drainage Ditch No. 1 and Drainage Ditch No. 2, the material portions of which are as follows:

The matter of the petition of O. S. Thompson, and others, representing that it is necessary that drainage Ditch No. 1 be permanently closed above the present spillway or outlet thereof, at a point in the Northeast quarter of the Southeast quarter of Section 5, Township 101, Range 49, and that such ditch be extended from such point running thence in a Southwest-
erly direction through Covell's Lake, and terminating at a point on the Big Sioux River in the Southwest Quarter of Section 18, in said Township, and that it is also necessary that drainage ditches No. 1 and 2 be repaired and put in

proper condition, coming on to be heard by the Board
342 of County Commissioners at a meeting of said Board

on Thursday, June 29, 1916, pursuant to notice theretofore given, and written objections thereto having been filed by the City of Sioux Falls, the South Dakota Central Railway Company and Catherine W. Peck, and others, and such objections having been presented orally by counsel for the various objectors, and the said petitioners having appeared personally and by counsel in support of said petition, and various parties having filed claims for damages which they claim will be sustained by them by the establishment and construction of said extension or outlet, and said hearing having been adjourned to this 8th day of July, 1916, and this Board having fully heard and considered said petition and all matters, evidence and arguments presented in opposition to and in support of the same;

Now, Therefore, Be It Resolved that the repair and maintenance of said drainage ditches 1 and 2, and the establishment and construction of said proposed extension to or outlet of drainage Ditch No. 1 will be conducive to the public health, convenience and welfare, and it is necessary and practicable for draining agricultural lands, and it is so found.

Be It Further Resolved that said drainage ditch No. 1 be permanently closed above the present spillway or outlet thereof, at a point on the West bank of Drainage Ditch No. 1, 1610 feet North and 58 feet West of the Southeast Corner of Section 5, Township 101, Range 49, where said drainage ditch swings Southeasterly from a Southerly direction, and that a new extension to or outlet of said drainage ditch, commencing at said point and running thence in a Southerly direction through Covell's Lake in the City of Sioux Falls, terminating at a point on the Big Sioux River in the Southwest Quarter of Section 18, in Township 101, Range 49, as described in the resolution adopted by the Board June 10, 1916, be constructed, and that such extension or outlet be and the same hereby is established.

343 Be It Further Resolved that drainage ditches No. 1 and 2 be repaired and put in proper condition, and that the same be cleaned, deepened and widened, and that the levees, dikes and barriers thereof be remodeled, reconstructed and repaired in such places and to such extent as may be necessary, in order that said ditches may carry off the surplus water and properly drain the lands affected thereby, the amount and extent of such repairs to be determined by this Board after an inspection, and, if deemed necessary, a survey of said drainage ditches.

Be It Further Resolved that this Board proceed to consider the claims presented and filed by various persons for damages which they claim will be sustained by them by the establishment and construction of said extension or outlet; that before the assessment of damages this Board personally inspected each tract of land or other property through which said extension or outlet will pass, and that the damages sustained by each tract of land or other property through which said extension will pass, and damages as compensation for the land taken for the route of such drainage be assessed by this Board at a regularly adjourned meeting.

Dated this 8th day of July, 1916.

* * * * *

The material portion of the judgment in the case of Oluf O. Gilseth vs. A. G. Risty, and others, as County Commissioners of Minnehaha County, South Dakota, et al, Defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al, Intervening Defendants, rendered by the Circuit Court of Minnehaha County, South Dakota, upon the

19th day of July, 1921, offered and received in evidence, is as follows:

"The Court having heard and considered the evidence introduced on behalf of the parties, and having heard the argument of counsel, and being fully advised in the premises, and having made and entered its decision in writing, consisting of Findings of Fact and Conclusions of Law;

344 Now, Therefore, on motion of Messrs. E. O. Jones, R. H. Warren, and Porter & Bartlett, representing the defendants and interveners,

It is hereby Ordered, Adjudged and Decreed that the plaintiff's complaint herein be, and the same is hereby dismissed on its merits."

345 P. H. EDMISON, being called as a witness on behalf of the defendants, testified in substance, as follows: (Tr. p. 236)

My name is P. H. Edmison. I live in Sioux Falls, and am in the transfer, building material and storage business, Manager of the Sioux Falls Warehouse Company. I had the contract for furnishing the cement used in the concrete work on the construction of the spillway on Ditch No. 1 & 2, during the Fall and Winter of 1917 and 1918. This cement was shipped from St. Louis. My contract with the Board of County Commissioners was to deliver this cement on the spur near the spillway North of the Penitentiary. In fulfilling that contract, I discussed with the agents of the Great Northern Railway Company and the Chicago, Rock Island & Pacific Railway Company of the City of Sioux Falls, the matter of delivering this cement on this spur. I discussed the matter with Mr. Pileher, the Agent for the Chicago, Rock Island & Pacific Railway Company, as to his ability to deliver freight coming in over his line on this spur. He told me that he could not do it, as they had no way of getting it up there. Some cement which came in over the Chicago, Rock Island & Pacific Railroad was taken to the spillway by truck. (p. 237)

I arranged with the Great Northern Railway Company to deliver the cement that came in over their line on this spur near the Penitentiary for the spillway business, without extra charge on the freight rate to Sioux Falls. Defendants' Exhibits 52 to 65 inclusive, which are freight bills issued by the Great Northern Railway Company for cars of cement shipped from St. Louis, Missouri, to Sioux Falls, dated July 26, 1917,

to September 12, 1918, are the freight bills for the cars of cement which were delivered to the County of Minnehaha for its use in the construction of the spillway on Drainage Ditch No. 1 & 2, which cars I had arranged with the Agent of the Great Northern Railroad Company in the City of Sioux Falls, to be delivered at the spillway, and they were so delivered and I paid the Great Northern for its service.

347 W. R. LARSON, being called as a witness in behalf of the defendants, testified in substance as follows: (Tr. p. 251).

My name is W. R. Larson. I had the contract with the Board of County Commissioners to deepen and widen these drainage ditches in controversy. The work was done in 1918 and 1919. We started in May, 1918, at the Minnesota road bridge, about one thousand feet from the water works, right across the Sioux Falls & Watertown Railroad, with a trenching machine shipped from Chicago over the Great Northern Railroad into Sioux Falls. It was shipped to their freight depot, and then I made arrangements with their agent here to have it spotted to the side-track over by the water-works. From the bridge we worked North towards Renner, up until about September. In the process we widened, and deepened it, and threw up an embankment on one side. There was a dike on the other side. The following year we did work on this ditch with another machine brought from Sioux City over the Chicago, Milwaukee, & St. Paul Railway, and delivered at Renner. There being no agent at Renner, I arranged therefor, and paid the freight through the Sioux Falls Agent. Those machines extend up, in the air about thirty feet, and this ditch is about 1000 or 1500 feet from the Chicago, Milwaukee & St. Paul right-of-way, or line of railroad. (p. 253)

(Stipulation that intervening defendants are owners of ditch warrants to amount alleged in their answer.)

At this time make the record show that it is stipulated between the respective parties to these actions, that the intervening defendants are the owners of ditch warrants drawn on Drainage Ditch No. 1 & 2 to the amount alleged in their answers, which have been issued and are now unpaid. (Tr. p. 253).

- 348 C. T. CHARNOCK, being called as a witness on behalf of the defendants testified in substance as follows:

My name is C. T. Charnock, I am one of the defendant County Commissioners in these actions; have lived in Sioux Falls about twenty-five years, and am familiar with the value of farm land in the vicinity of Sioux Falls, also the value of City property in the City of Sioux Falls. I have been over and am familiar with all the lands within the area of Drainage Ditch No. 1 & 2. Prior to fixing the apportionment of benefits thereon on June 10, 1921, I accompanied the Board of County Commissioners in making a personal inspection of all of the lands within the drainage area. The Board selected and determined the benefit to the unit adopted, which unit is situated about three and one-half miles North of Sioux Falls. We placed a value upon this land without the ditch, and a value upon it with the ditch. The difference between these values was the sum of \$25.00 which, in our judgment, was the real beneficial value to this unit produced by the construction of this drainage ditch. The Board applied that unit to all the lands within the drainage area, and used the same method of determining the number of units of benefit to all of the lands affected. In applying this unit towards fixing the proportion of benefits to the Chicago, Milwaukee & St. Paul Railway Company, we first took into consideration the land belonging to the railroad company, the acreage, and we assessed that practically the same as abutting lands, and then we took into consideration the benefits to the grades and the culverts that could be done away with, and to tracks and bridges, etc. That was figured out by our Engineer. The amount or number of units was arrived at by figuring it out in dollars and cents, and then dividing the total amount by the benefit to the unit or twenty-five, thereby obtaining the number of units of benefit which was, in our judgment, received by this railroad company.

- 349 We pursued the same course in fixing the number of units of benefit to the Chicago, St. Paul, Minneapolis & Omaha Railroad Company; also to the Chicago, Rock Island & Pacific Railroad Company; also to the Great Northern Railroad Company. We used the [the] same method in arriving at the proportion of benefits which, in our judgment, the Northern States Power Company received from this drainage ditch. In fixing the proportion of benefits to the Northern States Power Company there were a number of different elements taken into consideration. First, was the dam at Schjodt's. We put that int to control the water there in the

river, and also controlling gates or wiers at Thompson's, and the cut-offs of the river. We also took into consideration the property here in Sioux Falls known as the hydro-electric plant. These benefits, were arrived at by the same process of figuring the total benefit and dividing the same by the value of the benefit to the unit. The number of units which were fixed against these various plaintiffs in these actions represented the judgment of the Board in fixing the proportion of benefits upon the showing that was made, and the computation of our Engineer. We adopted the same process in arriving at the number of units which were fixed against the City of Sioux Falls for benefits. We used the same process all the way through on all the property that was taken under the ditch here.

Cross-Examination.

The unit we used was one acre of agricultural land. In determining the benefit to the Northern States Power Company, the Board took into consideration the dam at Sehjodt's, the purpose of which was to prevent the water from the Big Sioux River, where the River had broken through into the ditch, from being diverted into the ditch. The Power Company was

objecting to the ditch taking its power. The same condition is true with reference to the controlling gates at

350 Thompson's. The agricultural land had a value placed upon it, and was computed by the acre. I don't mean to say that all the land was assessed at one price. They vary in price according to benefit. Referring to the property of these plaintiffs, the method pursued was to figure the benefit in dollars and cents. The property now before the Court was not computed on the aereage plan. When we were making this assessment, we placed everyone the same value on it.

We did not make any difference whether the property belonged to the City or individuals. In assessing the railroads, we took the land that the railroad companies owned into consideration first, then the railroad itself, and then the culverts and bridges. The aereage that the railroad companies owned was only one element taken into consideration, and it was all assessed upon the unit plan. We took in mileage but mileage was not the only element taken into consideration. We did not use the valuation of the railroads, but we used the valuation of the benefits that we thought the railroads would receive from it. The Board went over the proposition with the Engineer, and he figured out the method to use and it was approved by the Board. We accepted his figures. The Engineer figured the proportion of bridges that could be saved by di-

verting the water through the spillway, and that was computed in dollars and cents, and divided by twenty-five, which made so many units. The whole system was figured on that plan. All of the different elements of benefit were figured up and added together. The Engineer showed us what benefits this would be, what it would amount to, and that is the way we handled it, by the \$25.00 unit, the same as we did the farms.

It was all figured out for us on paper. Then we took
351 the map and travelled over the entire system. The Engineer figured the savings to the bridges, the benefit to the road-bed, and the culverts and the land owned by the railroad. That was all taken in. Those are all the elements I remember.

Q. Now, Mr. Charnook, what was the basis upon which the streets of the City of Sioux Falls were figured on. What were the elements that entered into that?

A. If I remember right they were taken in about the same value as the property abutting.

Q. You mean that all of the streets within the drainage district were figured by the acreage and also other benefits?

A. We didn't figure the lots by the acre.

Q. I am not talking about lots, I am talking about streets?

A. When you get to the streets they are in where lots are laid out.

Q. I am asking about the city property or streets?

The Court: As I understand the witness, they did not consider that upon the acreage basis at all. Am I right?

The Witness: Yes sir.

Q. Upon what basis was the benefits figured?

A. It was figured on the valuation.

Q. Valuation? A. Yes.

Q. Upon the acreage valuation?

A. We figured if you kept the water off this lot you had benefitted it so many dollars.

Q. I am asking about the city streets.

A. I am telling you that we took the streets by the same value.

Q. And figured them in acre valuation?

A. No, not in acre valuation, lot valuation.

Q. Upon what basis?

352 A. I don't know as I can explain it so you can understand it.

Q. What benefits did you figure out that the city would derive to their streets from this spillway and ditch?

A. The drainage. Keeping the water off of them would be certainly a benefit to the streets as well as abutting property.

Q. Upon what basis, what theory?

A. I cannot tell you just how much.

Q. Upon what basis did you figure, for instance, Sherman Park?

A. I believe Sherman Park was run in by the acre.

Q. As agricultural land?

A. Somewhere near that.

Q. Was the streets that you just referred to also figured upon the basis of agricultural land?

A. Whenever they were on that, they were assessed along about the same as the property where the street was located.

Q. As agricultural land?

A. You wouldn't call city lots agricultural land?

Q. I am asking you what you done?

A. I am telling you we assessed the street along with the property where it laid.

Q. As agricultural land?

A. No, not as agricultural land.

Q. What about Phillips Park, how did you assess that?

A. There is only a portion of Phillips Park, I think, taken in. That is the north end.

Q. Upon what basis did you put that?

A. That was the same way.

Q. In fact, you assessed the city property, all of it, the same way you have described it here?

A. I think so.

353 HERMAN RETTINGHOUSE, being called as a witness on behalf of the defendants, testified in substance as follows:

My name is Herman Rettinghouse. I am a civil engineer and reside in Sioux Falls. I graduated in 1881 and came to the United States in 1882, and in the following year engaged in engineering work; was employed by the Milwaukee, Mitchell and Western Railway, which is now a part of the Chicago & Northwestern system, as an assistant and gradually advanced into higher positions until 1893, at which time I engaged in private work in Ashland, Wisconsin, where I was city engineer for three years. Also was engineer for two railroads and in the fall of 1897 again engaged with the Chicago & Northwestern Railway as assistant engineer and was promoted to superintendent of bridges and building on the same road in 1900, in which capacity I served for five years;

and from 1905 to 1907 was employed by the Wisconsin Central Railway Company as division engineer; had charge of the engineering construction work and maintenance of the entire road, and on January 1, 1907, again engaged with the Chicago and Northwestern as division engineer of the Northern Iowa and Sioux City Divisions, which position I held until the spring of 1913, when I was made division superintendent of the Iowa and Minnesota division of the Chicago & Northwestern. I remained there until November, 1913, and was then promoted to chief engineer of the Chicago, St. Paul, Minneapolis and Omaha, a part of the Chicago & Northwestern system. I retired from that service on March 1, 1920, at which time I was placed on the pension roll because of my impaired health. Since April 1, 1920, I have been a resident of Sioux Falls and have engaged in private practice as consulting engineer and senior member of the firm of Chenoweth & Rettinghouse, up to the present time. My first experience in public

drainage work was in 1905 in a project which was affecting the Wisconsin Central Railway and another similar project in Southern Wisconsin; January 1, 1907, while in the service of the Chicago & Northwestern as division engineer in Iowa, which comprised practically the entire state covered by that railroad, the drainage work was very extensive. It was the principal part of my duties to make myself familiar with and handle the drainage problems which came up constantly. During this time we had from one hundred to one hundred fifty drainage problems of various magnitudes. When I became chief engineer of the Omaha Railway, we had a number of drainage problems in the states of Wisconsin, Minnesota, South Dakota and Nebraska. It was my duty as chief engineer to make myself very familiar with them and to cover all the phases of the problems as to benefits, damages and the manner of assessing benefits and damages. In November, 1920, my firm was engaged by the Board of County Commissioners of Minnehaha County, to make a topographical survey of the district covered by Drainage Ditch No. 1 and 2 for the purpose of preparing a correct map and furnishing data to the Board as would enable it to place the proportional benefits on the land and interests affected. Defendant's Exhibit 1 is the map prepared by my firm, which shows the topography of the country adjacent to and affected by Drainage Ditch No. 1 and 2 of Minnehaha County. Drainage Ditch No. 1 and 2 at its initial point is not exactly in the Sioux River. A small creek connected with the Sioux River near the Southwest corner of Section 29, Township 104, Range 49. The initial point of that particular section which we term sec-

tion No. 3 is located at that point, a matter of five or six hundred feet from the river proper. There are controlling works and gates there which enable the ditch to be closed off from the river or from the creek, or opened and at flood time part of the water taken out of the river. Section No. 3 is located along the lowest land west of the Sioux River. The
355 land is naturally down lower than the banks of the river proper, a great deal in some instances. The land west of the ditch gradually rises as you go away from the ditch until you get to the foothills. The surface water on the outside of this ditch can most assuredly get into the ditch. The ditch was constructed for the prime purpose of draining this section of the country and inlets have been made at various points, at roads and intervening points, to permit this surface water to drain into the ditch.

This third section terminates in connecting with the river on the east and west line of Section 18, Township 103, Range 49, about a thousand feet west of the east line of Section 18. This ditch connects with the river as stated and the river from that point to a point on the southeast quarter of Section 20 has been straightened at various points, being practically canalized. At the point spoken of there is a bayou or an old portion of the river bed, which is partly filled up along the north, due to the fact that the river has been straightened to the west of it, and Section No. 2 connects, with this bayou about eight hundred feet east of the river proper. The ditch then extends parallel to the Milwaukee railway to near the junction point of the South Dakota Central line. At that point it diverges to a distance of about sixteen or seventeen hundred feet, running practically that distance parallel and in a southerly direction until it intersects the old bed of Silver Creek. It then follows Silver Creek in a southeasterly direction, cutting out all bends in it until it reaches a point at or near the Section line between Section 28 and 29, and runs in a southerly direction about a thousand feet parallel to the Milwaukee railway again until it reaches a point about a quarter of a mile north of the city limits, from which point it runs in a southeasterly direction to its terminus in the spillway. Throughout Section 2 which is described, the ditch runs in the lowest part of the country east of the river and serves the
356 purpose of a drainage ditch as well as for an overflow from the river. It was put in for the dual purpose of serving as an overflow and as a drainage ditch. You will notice on the map that Silver Creek runs in a very circuitous route along the ditch and it terminates in this ditch, so that

the waters of Silver Creek are more quickly disposed of than before and it therefore assists in draining the land adjacent to the ditch and Silver Creek and the same is true of the lands between the ditch and the river. The ditch assists in draining territory which is tributary to Silver Creek, which has its source north of the initial point of Section 2 of the ditch. The dam at Sehjodts is about eight hundred feet from the former end of the lateral ditch constructed there. This dam is about thirteen hundred feet from the present cutoff channel of the Sioux River. There are two controlling works; the one mentioned composed of a gate at the initial point of Section 3. At the initial point of Section 2 there is a concrete bridge with a wier under the same which permits the water to rise to a certain point before it enters into the ditch and thereby is retained in the river proper. This was installed for the purpose of controlling the rise of the water in the river. In making of the survey of which I had charge, I made frequent trips over the territory in order to familiarize myself with all the elements that might come into consideration, and particularly as to the relative benefits derived, bearing in mind that it was necessary to arrive at some certain basis so as to be able to make the proper recommendations to the Board. In going over the territory, I came to the conclusion that at the location of this unit, it was about as good an illustration as could be found along the entire district, and I selected this unit for my recommendation to the Board. On Section 2 of this district, which terminates in the Sioux River, there are openings left at all necessary points to drain off the surface water and carry it into the ditch. After we had made our report

357 to the Board and I can best illustrate it by reading the sentence, "We also submit as an aid in your work of equalizing the benefits, a complete list of all the lands with the acreage of each parcel and proportionate benefits. We have made a thorough investigation and have minutely looked over all of the affected lands. In consideration of the proportion of benefits, we have selected a particular tract for a unit, one acre, more particularly described later, in the west half of the northwest quarter of Section 29, Township 102, Range 49". Together with that report we submitted a recommendation as to the proportional benefits and after the board had received this report, we made a trip over the entire district lasting several days. We had one of the maps with us and we viewed all the lands and all of the other points where other benefits were to be proportioned. The particular percentages of the different parcels of land came under consideration and were pointed out, and if a dispute arose as to whether

or not it was the proper amount of percentage, it was corrected and agreed upon right there by the Board, so that at the conclusion of our inspection the Board was familiar with all of the facts of the situation as I was myself. We used this unit selected as one and compared the other real estate with it. It was decided by the Board that the acre in question was worth one hundred dollars prior to the improvements and that it was worth one hundred twenty-five dollars subsequent to the improvements. Therefore the actual value of benefit to the unit selected was twenty-five dollars. All the agricultural land was assessed in relation to this unit. Many of the lands were only 30 or 40% depending upon the amount of benefit derived, as compared with this unit, being one hundred per cent. There were other lands that were as high as three hundred and three hundred fifty per cent of this unit. I am familiar with the cost of construction and upkeep of highways. In arriving at the benefit to the highways within this drain-

358 age area we estimated the benefits in this way. There

is a certain amount of annual maintenance necessary for any road, and there is more than that amount necessary under flood conditions. That is to say, a road that is periodically flooded as against a road that never is flooded. The difference in the estimated cost of maintenance was capitalized, or represented the interest on a certain sum of money, and we consider the capitalized portion as a real benefit. We then, after obtaining that result after making a great many calculations, taking into consideration the various locations, some of them benefitted more than others.

We divided the amount arrived at by the value of the unit of \$25, thereby obtaining the number of units as a proportional benefit for these roads. The sum we divided by the unit represented the capitalized value to that part of the highway; we applied the same method to the streets and highways of the City of Sioux Falls. We did not apply the acreage basis to the city property, excepting possibly the grounds where the water works are located. In applying the benefit to the unit and what the Board took into consideration as elements of benefit to the Milwaukee Railway Company, we took into consideration the fact that in the first place there were practically three elements. First was the right-of-way on the acreage basis, which was estimated in proportion to the adjacent lands. Second, that it was possible to shorten or abandon certain bridges. In order to determine the benefits derived therefrom is simply a mathematical proposition. It costs a certain amount of money each year in order to maintain a bridge,

whether it is a pile bridge or a steel bridge. We know how long these structures will last. We figure the cost of a bridge and divide it by the number of years in order to get the amount that is necessary to be expended each year for replacement. Taking the amount in dollars and cents multiplied by the length of the bridge and divide that and capitalize that at 7%, which is the usual rate of interest, and that determines 359 the amount of benefit. This was the second element.

The third element is the fact that by reason of the flooding of the territory in which railroads are located, washouts often occur. We obtained data and from my personal knowledge and experience I have a very good idea of what it costs to repair washouts periodically appearing and we estimated as close as possible how much it would amount to every year and capitalized that amount again.

Again as an additional element, a road-bed is solidified or made stronger by not being subject to floods. A road-bed that is constantly or for great lengths of time subjected to submersion is certainly weakened, and again, so far as humanly possible, we figured the amount of benefits in dollars and cents and after getting all of these results or capitalized amounts, we divided that by twenty-five as our measure and determined the number of units of benefit. That system and general method and plan was used to determine the amount of benefits that each railroad received from these separate elements. There were three elements of benefit so far as the Northern States Power Company is concerned. One of them was the fact that through the construction of the wier at the initial point of section 2 and through the construction of the dam commonly known as Sehjordt's dam and I believe some dike work done at other points, the power company was assured of a constant flow of water or a normal stage of water. The second element, that through the diversion of a part of the water of the Sioux River through this drainage ditch, which has been estimated at from twenty-six hundred to three thousand second feet, as against a total flood condition of six thousand feet, and all the way from 6000 to 10000 second feet, a benefit was created in that much water being taken away from the tail race and lowering the available head at 360 the power company's plant. In determining what proportion that would be, I was largely guided by the report made by Mr. Link, in which the results of his investigation were given and the amount of second feet of water in flood stages of the river at certain periods mentioned. I was also dependent upon the information and investigation made by

Mr. Shenehon, who designed the spillway, and I came to the conclusion as a fair proportion of the waters diverted, we could assume one-third of the entire river from the end of section 2 in lowering the head of the hydro electric plant, through the flood waters; also the lay of the land opposite the hydro electric plant is such that all of the flood waters, after passing over the dam, must pass through the tail race. All these elements were considered in the determination of the benefits accruing to the Northern States Power Company.

Q. Just a moment, let me call your attention to certain cut-offs in the river. What if any?

A. I said there were three elements and I only mentioned two. The other is the straightening of the river which has been done to a large extent between the upper end of Section No. 2, at this point clear down to this point near the Watertown & Sioux Falls Railway. The velocity of the water was greatly increased of the waters flowing through the river, and it thereby shortened the flood period, in that the water passed through the river much quicker than it did before. The total amount of water that is collected in the initial point of these cutoffs is hastened down the river past the Northern States Power Company's Plant. The ditch takes one third out of the river. I have estimated it as closely as humanly possible at one-third, it may be more. These were the elements we considered in apportioning the benefits to the hydro electric plant. Using these elements, we estimated the amount that

would be saved by the power company through the fact
361 that the head was not lowered to that extent and capitalized that amount.

The power company, by by-passing these flood waters, would have a constant aggregate output of hydro electric power and in season other than flood seasons the controlling works and dams keep all the water in the river that should be there and pass it around over the power company's turbines, insuring to them a constant flow even at a low stage of water in the river. (Tr. p. 285) The Great Northern had 2.4 acres of right-of-way which the Board considered benefited by reason of this ditch. They have one-fifth of a mile of track, two bridges protected, and 315 feet approximately of bridge that might be abandoned. The Chicago, Rock Island and Pacific has 12-1/8 acres of right-of-way that is benefited, one mile of track and two bridges benefited to be shortened, together approximately 230 feet. The Chicago, Milwaukee and St. Paul Railway has 172 acres of right-of-way, 14.2 miles of track, two bridges protected, one bridge shortened one hundred feet and one bridge of 176 feet aban-

doned, all benefited thereby. The Chicago, St. Paul, Minneapolis and Omaha has two and one-fourth miles of track, 27 acres of right-of-way, 405 lineal feet of bridges abandoned and two bridges protected. These items I have mentioned, in my opinion, were benefitted by the construction of this ditch and the diverting of the water as I have testified. There were three elements in regard to the assessment of the city of Sioux Falls. First, the streets, estimated at about 14 miles of streets within the drainage district. They are benefited in the same manner as I have explained in regard to the county and town roads, although the benefits were more varied on account of the streets being built of different character.

The second item was the parks. We figured that from 362 the diversion of the flood, the annual maintenance of the parks was reduced, that is to say there was less work to maintain the grounds as compared with the ground that was flooded. Another item was the benefit to the water works. It seems to be a fact that through the placing of the spillway the life of the water works was saved, insofar as productiveness of the wells is concerned. Another item is that during flood conditions, the water works were unproductive. We have estimated a certain number of days each year that the water works were out of commission. These wells were flooded by surface water and made them unsanitary and unfit for drinking purposes. We figured the amount that that would bring and capitalized the amount same as the capitalization of the streets and parks and divided that amount by twenty-five in order to arrive at a certain number of units. From my experience and the facts and data that I have been able to gather, the benefits that I have mentioned are direct, benefits to the railroad companies and their properties by reason of the construction and maintenance of this ditch; and the benefits which I have outlined to the city and Northern States Power Company were direct benefits to them. After determining the amount of the units and actual amount of money necessary to be raised, that amount is divided by the number of units to produce the value of a unit; and by that process we reduce the actual value of the unit down proportionately to each party affected.

Q. You reduced the valuation down proportionately to each property affected whether it was railroad or ranch property? A. All treated alike.

Q. And that, in the final analysis will be the assessed benefit after being equalized? A. It will.

Q. Calling your attention to the fact that the river contin-

ues around the city for some miles beyond the outlet of the
spillway, what is the effect of by-passing this water
363 upon adjacent lands, starting at the city limits on the
north around this city until the ditch dumps the water
back into the river. Is that a benefit or not?

A. It constitutes a direct benefit. The same benefit as
to lands farther up the river.

Cross-Examination,

By Mr. Campbell:

When I speak of the ditch diverting something like three thousand feet of water, I have reference to the discharge capacity of the ditch at its lower end; I couldn't tell what proportion of the water came out of the river during the flood stage; I should think a majority of the water came out of the river; I don't know the capacity of the ditch at its upper end; we haven't figured that; the ditch does not divert water from the river at any other point than that; I do not know what the amount is that is diverted there; the wier that I speak of down here that controls the flood of the river is constructed to keep the water from going into the ditch at normal stage; if the ditch were not there, the water would go down the river just the same. The second element that I said I took into consideration, that is, the diversion of the flood of the water would lower the tail race of the Northern States Power Company at flood times to the extent of the water that was diverted; I couldn't tell you how much that would be; I couldn't tell you how many kilowatt hours of output the plant would gain by reason of that diversion; that is a matter in hydro-electric engineering that I have not attempted to qualify; the value of that increased head would be measured by the value of the increased output from the hydro-electric plant; this answer is based upon the assumption that it is cheaper to produce electric current from a hydro-electric plant than from a steam plant.

364 By Mr. Grantham:

I didn't know I determined the capacity of the stream; we have several cross sections taken at various points of the ditch and the river as well; I [could'] tell you whether I have a cross-section of the ditch at about the point where the ditch that runs to the spillway is fed by the river; we have taken cross sections of every half mile; the ditch is not uniform all the way; I have no idea at all of the size of the stream; in testifying here that the ditch carries one-third of the water, I was basing my conclusion upon the investigations made; I determined on my survey the high water mark; the [height]

above the banks of the stream of the high water varies at various points; the dotted line here on the map shows the high water line; at an elevation of 1438, the [height] of the high water line is about ten feet above the banks of the river; the water at that point would be about 8000 feet wide on the surface; it is impossible for anyone to tell you off-hand just what the average depth of water would be there without showing cross-sections at every point. I have no idea.

Q. How did you determine the capacity or amount of water carried if you didn't know the amount of water in the stream? A. I was not engaged for that purpose.

Q. You don't know as a matter of fact the amount of water that is carried down the stream in flood time? A. I do not.

Cross-Examination of Herman Rittenhouse for Rock Island Railroad,

By Mr. Fairbank:

There was an assessment placed against the Rock Island Railroad for benefit for the maintenance of its tracks, and that was the mile of track. That is the track below the city, between the city and the bridge crossing the river, and 365 then the two bridges I say can be shortened 230 feet.

On the bridge southwest of town it was to be shortened 120 feet on the west side, and the bridge here in town was to be shortened 110 feet. That would take out one span on the south side of the bridge.

Defendants rest.

Endorsed: Statement of Evidence filed in the District Court on Jan. 10, 1923.

366 (Approval of statement of evidence by District Judge.)

The above named appellants having presented and filed in this Court their statement of the evidence in the above entitled cause, and the above named respondents having filed their objections thereto and asking that part of said statement be stricken and said respondents' statement of said evidence be substituted in lieu thereof, and the appellants having filed their objections to said substituted statement of said respondents, and said differences having been submitted to the above named court, and said statement having been made up and completed in conformity with the directions or said 367 Court,

Now Therefore, It Is Ordered that said statement so made in conformity with the order of this Court and hereto

attached be and the same is hereby approved as a true and complete statement of the evidence in this cause.

By the Court:

JAS. D. ELLIOTT, Judge.

Attest:

(Seal of Court) Jerry Carleton, Clerk.

Endorsed: Filed in the District Court on Jan. 10, 1923, at
2. P. M.

368 (Clerk's Certificate to Transcript.)

United States of America,
Southern Division,
District of South Dakota—ss.

I, Jerry Carleton, Clerk of the District Court of the United States of America, in and for the District of South Dakota, do hereby certify and return to the Honorable the United States Circuit Court of Appeals, for the Eighth Circuit, that the foregoing, consisting of 367 pages, numbered consecutively from 1 to 367, inclusive, is a true and complete transcript of all of the record, process, pleadings, orders and final decree as enumerated in the Praecept of the parties appellant and the Praecept of the party appellee to this cause filed herein, directing the Clerk what parts of the record and papers to be included within such transcript, as fully as the same appears from the original records and files of said Court; and I do further certify and return, that I have annexed to said transcript, and included within said paging, the original Citation, together with the affidavit of service thereof, and in addition thereto a copy of said Praecipes and all written opinions of the Court filed in said cause.

In Testimony Whereof, I have hereunto
Seal set my hand and affixed the seal of
U. S. Dist. Court, said court, in the said District, this
Dist. of South Dakota. 15th day of March, A. D. 1923.

JERRY CARLETON, Clerk.

Filed Mar. 20, 1923. E. E. Koch, Clerk.

246 And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz:

(Order of Submission in causes Nos. 6312 to 6317, inclusive.)

United States Circuit Court of Appeals, Eighth Circuit.

December Term, 1923.

Monday, December 17, 1923.

Appeal from the District Court of the United States for the District of South Dakota.

A. G. Risty, et al., as County Commissioners, etc., et al.,
Appellants,
No. 6312. vs.

Chicago, Rock Island and Pacific Railway Company.

Appeal from the District Court of the United States for the District of South Dakota.

A. G. Risty, et al., as County Commissioners, etc., et al.,
Appellants,
No. 6313. vs.

Chicago, Milwaukee and St. Paul Railway Company.

Appeal from the District Court of the United States for the District of South Dakota.

A. G. Risty, et al., as County Commissioners, etc., et al.,
Appellants,
No. 6314. vs.

Chicago, St. Paul, Minneapolis and Omaha Railway Company.

Appeal from the District Court of the United States for the District of South Dakota.

A. G. Risty, et al., as County Commissioners, etc., et al.,
Appellants,
No. 6315. vs.

Northern States Power Company.

247 Appeal from the District Court of the United States for the District of South Dakota.

A. G. Risty, et al., as County Commissioners, etc., et al.,
Appellants,
No. 6316. vs.
City of Sioux Falls.

and

Appeal from the District Court of the United States for the District of South Dakota.

A. G. Risty, et al., as County Commissioners, etc., et al.,
Appellants,
No. 6317. vs.
Great Northern Railway Company.

These causes Nos. 6312, 6313, 6314, 6315, 6316 and 6317, having been called for hearing in their regular order, upon application of counsel for the respective parties the time for oral argument was enlarged to five hours, and thereupon argument was commenced by Mr. N. B. Bartlett for appellants, continued by Mr. A. B. Fairbank for the appellee Chicago, Rock Island and Pacific Railway Company, by Mr. C. O. Bailey for the appellees Chicago, Milwaukee and St. Paul Railway Company, Chicago, St. Paul, Minneapolis and Omaha Railway Company and the City of Sioux Falls, by Mr. Ed L. Grantham for the appellee Chicago, Milwaukee and St. Paul Railway Company, by Mr. Harold E. Judge for the appellees Northern States Power Company and the Great Northern Railway Company, and concluded by Mr. E. O. Jones for appellants.

Thereupon, these causes were submitted to the Court on the transcripts of the records from said District Court and the briefs of counsel filed herein.

248 (Opinion in Causes Nos. 6312 to 6317, inclusive.)

United States Circuit Court of Appeals Eighth Circuit.

December Term, A. D. 1923.

Appeal from the District Court of the United States for the District of South Dakota.

A. G. Risty, et al., as County Commissioners, etc., et al.,
Appellants,
No. 6312. vs.

Chicago, Rock Island and Pacific Railway Company, a corporation, Appellee.

December Term, A. D. 1923.

Appeal from the District Court of the United States for the District of South Dakota.

A. G. Risty, et al., as County Commissioners, etc., et al.,
Appellants,
No. 6313. vs.

Chicago, Milwaukee & St. Paul, Railway Company, Appellee.

December Term, A. D. 1923.

Appeal from the District Court of the United States for the District of South Dakota.

A. G. Risty, et al., as County Commissioners, etc., et al.,
Appellants,

No. 6314. vs.

Chicago, St. Paul, Minneapolis & Omaha Railway Company,
Appellee.

249 December Term, A. D. 1923.

Appeal from the District Court of the United States
for the District of South Dakota.

A. G. Risty, et al., as County Commissioners, etc., et al.,
Appellants,

No. 6315. vs.

Northern States Power Company, Appellee.

December Term, A. D. 1923.

Appeal from the District Court of the United States for the
District of South Dakota.

A. G. Risty, et al., as County Commissioners, etc., et al.,
Appellants,

No. 6316. vs.

City of Sioux Falls, Appellee.

December Term, A. D. 1923.

Appeal from the District Court of the United States for the
District of South Dakota.

A. G. Risty, et al., as County Commissioners, etc., et al.,
Appellants,

No. 6317. vs.

Great Northern Railway Company, Appellee.

Mr. N. B. Bartlett and Mr. E. O. Jones for appellants.

Mr. A. B. Frairbank (Mr. Edward S. Stringer, Mr. Thomas
D. O'Brien and Mr. Alexander E. Horn with him on the
brief), for appellee in No. 6312.

Mr. C. O. Bailey and Mr. E. L. Grantham (Mr. H. H. Field,
Mr. J. H. Voorhees, Mr. P. G. Honegger, Mr. T. M.
Bailey and Mr. C. O. Bailey, Jr., were with them on
the brief), for appellee in No. 6313.

250 Mr. C. O. Bailey (Mr. R. L. Kennedy, Mr. J. H. Voorhees, Mr. P. G. Honegger, Mr. T. M. Bailey and Mr. C. O. Bailey, Jr., were with them on the brief), for appellee in No. 6316.)

Mr. Harold E. Judge (Mr. R. M. Campbell was with him on the brief), for appellee in No. 6315.

Mr. C. O. Bailey (Mr. Roy B. Marker was with him on the brief), for appellee in No. 6316.)

Mr. Harold E. Judge for appellee in No. 6317.

Before Kenyon, Circuit Judge, and Trieber and Dyer, District Judges.

Statement.

In the year 1907 the Board of County Commissioners of Minnehaha County, South Dakota, acting under the drainage statutes of that State, established and had constructed a drainage ditch known as Drainge Ditch No. 1, bottom width of forty feet, at an expense of \$46,600.00. This ditch was north of Sioux Falls and ran first in a southerly direction from its initial point; thence easterly past the pumping station of the City of Sioux Falls; thence southeasterly about one thousand feet to the Big Sioux River near the north limits of Sioux Falls. It passed through a ridge and descended approximately one hundred feet in the terminal thousand feet. A spillway was constructed to carry the water down the descent. This ditch was approximately three miles in length and there was a spur 670 feet long extending northwest into a bayou about two thousand feet south of the initial point.

In 1910 the Board of County Commissioners established another drainage ditch known as Drainage Ditch No. 2, which extended north from the northern terminal of Drainage Ditch No. 1, for a distance of about twelve miles. This ditch likewise had a forty-foot bottom and was constructed at a cost of \$81,106.19. These two ditches, making in fact one continuous ditch, drained certain agricultural lands, and traversed the land north of the City of Sioux Falls near the gravel bed from which the city obtained its water supply. It also passed near the State Penitentiary lands and emptied into the Big Sioux River north of the falls in said river.

251 In the year 1916 there was a breaking of the river through the natural barrier into the bayou drained by the lateral branch. This coupled with the large volume of water passing through these ditches made it impossible for

the spillway to carry the same, and it was washed out and destroyed. The water therefore being uncontroled descended from the steep bluff to the level of the Big Sioux River, and serious damage was threatened to various interests. There was danger that the Big Sioux River which flowed through the City of Sioux Falls would be diverted from its course and flow through these ditches cutting off the water supply of the City of Sioux Falls, injuring the Northern States Power Company, and depriving it of its water power.

The Board of County Commissioners attempted to devise some plan to reconstruct the spillway and to protect these various interests from the threatened damages.

April 8, 1916, certain parties filed a petition with the Board of County Commissioners asking that that portion of Drainage Ditch No. 1 containing the old spillway be closed and abandoned, and the course of said ditch extended in a southerly direction thorough Covell's Lake to the Big Sioux River; and said Board did pass a resolution that said Drainage Ditch No. 1 be permanently closed above the present spillway or outlet thereof.

August 3, 1916, a petition of F. L. Blackman and other parties was filed entitled, "To Reconstruct and Improve Drainage Ditches Numbers One and Two in Minnehaha County, South Dakota, and to Construct a New Spillway or Outlet to said Draintage Ditches Numbers One and Two and to Pay Therefor by an Assessment upon the Property, Persons and Corporation Benefitted Thereby." This petition was transmitted by he Board to the State Engineer, and on August 14, 1916, a survey was ordered.

September 13, 1916, a report of the survey was made and filed by the engineer in charge. A resolution was thereupon adopted by the Board fixing the line and width of said new proposed ditch in the exact location of old ditches No. 1 and No. 2, and providing for the time and place of hearing the petition. Notice was published for three successive weeks describing the route of the proposed drainage, and the tract of country likely to be affected thereby, in the general terms provided by the statute; also the separate tracts of lands 252 thorough which the proposed ditch would pass, and the names of the owners of said tracts. Such notice informed all persons affected by the proposed drainage to appear at such hearing and show cause why the same should not be established. Upon the return date of the notice the commissioners adopted a resolution purporting to establish the so-called

Drainage Ditch No. 1 and 2, and providing for the reconstruction of the spillway.

No appeal was taken from this order establishing the purported new project.

The commissioners then caused Ditches No. 1 and No. 2 to be cleaned out, widened, deepened and diked so as to increase the carrying capacity; caused the spillway to be reconstructed, and certain portions of the Big Sioux River to be straightened. This work cost approximately \$255,000.00, and drainage warrants were issued to be paid out of taxes assessed against the property determined to be benefited within the area of the purported new Drainage Ditch No. 1 and 2. The largest holders of these warrants are interveners in this action.

In April, 1919, notice was published of a hearing upon the matter of equalizing benefits resulting from said Drainage Ditch No. 1 and 2, and this was the first intimation that certain of appellees had that benefits might be assessed against them. The property of some of the appellees was not covered by the notice. However, the proceedings under this notice were abandoned.

June 10, 1921, appellant Board by resolution fixed a proportion of benefits in units, which had been decided upon as a fair method of arriving at the same, on Drainage Ditch No. 1 and 2, and designated Monday August 1, 1921, at the office of the County Auditor, as the time and place for a hearing on the question of equalizing benefits, and caused notice of such hearing to be published as provided by the statute. Under the unit system adopted by the Board upon recommendation of their engineer, the various appellees had units allotted against them as follows:

Chicago, Rock Island & Pacific Railway Co., out of a total of 32,549.62 units,	839.45
Chicago, Milwaukee & St. Paul Railway Co.,	1681.
Chicago, St. Paul, Minneapolis & Omaha Railway Co.,	839.45
Northern States Power Co.,	5351.63
Great Northern Railway,	613.85
City of Sioux Falls,	3147.95

253 The amount due on warrants issued for this work at the time the actions were brought was about \$300,000.00. The total units of benefit aggregate 32,549.62, so each unit of benefit amounts to slightly in excess of \$9.00. If no changes had been made by the Board, had they been permitted to pro-

ceed, the amounts charged against various appellees would have ranged from \$50,000.00 against the Northern States Power Company to substantially \$6,000.00 against the Great Northern Railway Company.

Appellees brought suit to restrain appellants from proceeding further with the equalization of said purported benefit and from levying any assessment upon their property to pay therefor. Some of the appellees had no property in original Ditch District No. 1 and No. 2; others of appellees did have, and some difference is made in the contention of those not having property in the original Ditch District and those who did have, but the issues in the main were the same as to all the parties.

All of the appellees contended in the trial court that the South Dakota drainage law was unconstitutional, violating the Fourteenth Amendment to the Constitution of the United States; that is also violated Sections 2 and 3 of Article 6 of the Constitution of the State of South Dakota. Some of the appellees contended that the Board exceeded its powers in what it attempted to do, in that the same was not for the drainage of agricultural lands, but being for other public purposes, could only be carried on by the corporate authority of drainage district entities established for that purpose, which had not been done, and that consequently the proceedings were void.

Others of the appellees contended that the proceeding seeking to establish Drainage Ditch No. 1 and 2 was a subterfuge to impose liability on new territory to pay for the maintenance of the former ditches, and that the proceedings were for maintenance and repair of the old drainage ditch and were not carried on as provided by Section 8470 of the Code of South Dakota relating to assessments for the maintenance of drainage already established; that Drainage Ditch No. 1 and 2 was not a new ditch and not a new enterprise.

Further claim is made by the railorad appellees that the South Dakota drainage law is unconstitutional so far as respects assessments of railroad property, in that it provides for the giving of no notice whatever of the apportionment and equalization of benefits to railroad companies.

All appellees claim that the attempted assessments upon their property are arbitrary, unjust and illegal, and constitute a discrimination so palpable and arbitrary as to amount to a

denial of the equal protection of the law; and that the proceedings create a cloud upon their title.

It was the position of appellants on the other hand that the statutes referred to were constitutional; that the Federal Court in equity had no jurisdiction because there was a complete remedy at law; that there was no equitable question involved; no irreparable injury shown; no facts sufficiently plead to show any threatened cloud upon title; that the amount involved was not sufficient to give jurisdiction; that the bringing of the suit was premature; that Ditch No. 1 and 2 was legally established as a new drainage project under the statutes of South Dakota, and that the Board of County Commissioners had full jurisdiction to do each and every act which they performed.

The Trial Court held that Section 8461 of the Revised Statutes of South Dakota, being the statute particularly attacked as unconstitutional, gave sufficient notice and opportunity to be heard before an assessment became a lien against the property, and was constitutional. The Court also held that the proceedings of the commissioners were proceedings for the maintenance of the original Ditches No. 1 and No. 2; that there was no abandonment of the old ditches; that the formation of the new ditch was a pretense and subterfuge carried on for the purpose of compelling property outside of the original Ditches No. 1 and No. 2 to share the burden of the repair and maintenance of these ditches, and held that the proceedings of the commissioners with relation to Ditches No. 1 and No. 2, by attempting to constitute a new drainage district and calling it District No. 1 and 2, were void.

The Court further found that the complaints presented a real and substantial question under the Constitution of the United States; that the amount involved was in excess of \$3,000.00 exclusive of interest and costs, and that each complainant stated a case in his bill cognizable in equity in the Federal Court; and that there was no adequate remedy at law.

Also found that diversity of citizenship existed as to 255 all appellees, except as to the City of Sioux Falls; also that the method of attempted assessment was discriminatory and arbitrary. The injunctions as prayed were granted.

Kenyon, Circuit Judge, after stating the facts as above, delivered the opinion of the Court.

It is earnestly contended by appellees that the entire South Dakota drainage law is unconstitutional, not only as violative

of the due process clause of the Fourteenth Amendment of the Federal Constitution, but also of Sections 2 and 13 of Article 6 of the South Dakota Constitution. The constitutional questions raised are grave, serious and doubtful. Their determination is not necessary to the solution of these cases. Therefore, under the well-established rule that Federal Courts will not pass upon the constitutionality of statutes unless absolutely necessary, we leave the questions aside. *Howat et al. vs. State of Kansas*, 258 U. S. 181; *Weyman-Bruton Co. vs. Ladd*, 231 Fed. 898; *Allen, U. S. Atty., vs. Omaha Live Stock Commission Co. et al.*, 275 Fed. 1.

The original Drainage Ditches No. 1 and No. 2 were properly established for the drainage of agricultural lands. When the spillway washed out the maintenance of the ditches was impaired. Not only that, but the situation was fraught with grave consequence to many interests. The steep bluff was being torn away by the uncontrolled waters; the waterworks and water supply of the City of Sioux Falls, as well as the penitentiary lands of the State, were endangered. A not improbable result of the Big Sioux River breaking through the natural barrier into the lateral ditch would be the entire diversion of its waters from their natural channel causing them to flow through staid ditches and empty into the river north of the city, leaving Sioux Falls with an intermittent dry river bed.

The Board of County Commissioners under these conditions took steps to remedy the situation, and upon petition filed stating its object in its caption as follows: "To Reconstruct and Improve Drainage Ditches Numbers One and Two in Minnehaha County, South Dakota, and to Construct a New Spillway or Outlet to said drainage Ditches Numbers One and Two and to Pay Therefor by an Assessment upon the Property, Persons and Corporations Benefitted Thereby," proceeded to establish what is termed Drainage Ditch No. 1 and 2, Minnehaha County, South Dakota.

256 Appellees who have property within the area of the original Drainage Ditches, No. 1 and No. 2, insist that the proceedings established a new Drainage Ditch known as No. 1 and 2, which is also the position taken by appellants. Other appellees claim that the work was in truth and in fact a project for the repair of Drainage Ditches No. 1 and No. 2. The Court held that the forming of the new ditch was a pretense and subterfuge resorted to for the purpose of attempting to burden appellees with the cost of maintenance of ditches theretofore constructed; that the Commissioners did not act

as by law provided for the maintenance and repair of the ditches and that the proceedings attempting to establish the new drainage ditch were void. We think the Court was correct in this holding. It clearly expressed the situation as follows:

"Under these circumstances the Board of County Commissioners had absolutely no authority, no right or color of right, were not acting under the provision of any statute of the State when they assumed the right to reach out and attempt to assess the benefits for the repair and maintenance of said ditches against the property of the various plaintiffs. They were mere trespassers, for the reason that no drainage Ditch No. 1 and 2 was ever established and has no existence.

"I am of opinion that the proceedings of the Board of Commissioners in the repair and maintenance of these ditches, No. 1 and No. 2, by assuming the right to constitute a new drainage district, calling it District No. 1 and 2, and to assess benefits to the property of the plaintiffs, insofar as they are located in the City of Sioux Falls, are void. Entertaining this view it follows that plaintiffs' prayer for an injunction should be granted." (Record, p. 90, Case No. 6313).

The proceedings, regardless of how designated, were in fact for repair and maintenance, and were governed as to assessments to pay for the same by Section 8470 of the South Dakota Statutes, which section is as follows:

"Assessments for Maintenance. For the cleaning and maintenance of any drainage established under the provisions of this article, assessments may be made upon the landowners affected in the proportion determined for such drainage at any time upon the petition of any person setting forth the necessity thereof, and after due inspection by the board of county commissioners. Such assessments shall be
257 made as other assessments for the construction of drainage, certificates may be issued thereon and assessments and certificates shall be liens, interest-bearing, perpetual and enforceable, in all respects as original assessments and may be sold at not less than par by the board of county commissioners, turned over to persons contracting for such cleaning and maintenance or may be collected directly by the board of county commissioners. (Sec. 13, ch. 98, 1905; Sec. 13, ch. 134, 1907.)"

There is no provision in this statute for the taking in of other lands to help bear the assessment of burdens created in maintaining the original drainage. This was the statute un-

der which the Board of County Commissioners could have provided for payment of maintenance and repairs to the established ditches.

Section 8489 provides for a method of abandonment of drains under certain circumstances and the construction of new ones in the same location. Said statute is as follows:

"Invalid or Abandoned Proceedings. If any proceeding for the location, establishment or construction of any drain under the provisions of a previous law has been heretofore enjoined, vacated, set aside, declared void, dismissed or voluntarily abandoned in consequence of any error, defect, irregularity or want of jurisdiction affecting the validity of such proceeding or for any cause, the board of county commissioners may nevertheless proceed to locate a drain or drains under the same or different names and in the same or different locations from those described in the invalid or abandoned proceedings under the provisions of this article. In case any new proceeding be had resulting in the location of a drain in the same or substantially the same location as that described in the invalid or abandoned or dismissed proceeding, and the extent to which the same will contribute to the location, establishment or completion of such new drain. Such value shall be determined at a hearing upon the same notice as the equalization of benefits or assessments, and may at the same time or at any other time, and the notice of such hearing may be a part of the notice of the hearing upon the equalization of benefits or assessments or separate therefrom, but the board shall in any case notify all persons interested

to show cause why the determination of the board
258 thereupon shall not be final. When finally fixed such value shall become a part of the cost of the new drainage. No use shall be made by the board of county commissioners in the laying out or completion of any drain or ditch under this article of any map, chart, survey, or other work done under any former law or under this article without having paid therefor; and all sums allowed for any work or material or money expended under the provisions of any previous law or under this article shall be paid to the persons who have paid therefor in proportion to the amounts severally paid by such persons. (Sec. 33, ch. 134, 1907.)"

The proceedings establishing Drainage Ditches No. 1 and No. 2 have never been set aside or abandoned under this statute. It is true a small portion of old Ditch No. 1 was abandoned by the resolution adopted in the Covell's Lake proceeding, but the ditches were in no way abandoned. The Covell's

Lake proceeding was itself abandoned and the ditches were left as they originally were, so it is apparent that the action of the Board was not taken under Section 8489. Either the proceedings were to repair and maintain ditches already constructed, or they were to take care of a situation resulting from their imperfect or inadequate construction. By reason of the water of the river breaking through into the lateral threatening a change of the river's course and the possible destruction of State lands, a situation was presented, not with relation to the drainage of agricultural lands, but rather to the failure of the ditches, due to inadequate or imperfect construction, to carry the increased flow of water. In other words, the project, if an entirely new one, was not for the drainage of agricultural lands. The Court said in his opinion: "Pursuant to this provision of the constitution, the legislature of the state has provided for the drainage of agricultural lands; but nowhere is there any statutory enactment under which drainage districts may be formed for the drainage of lands 'for any public use.' " We are satisfied that under the South Dakota Constitution, Section 6, Article 21, drainage of lands for any public use other than the drainage of agricultural lands, must be carried out by drainage districts, and no legislation at the time of these proceedings had been provided for the establishment of such drainage districts. Whichever way, therefore, the matter is viewed, the Board was acting without legal authority in its apportionment of benefits and threatened assessment of taxes.

259 Appellants challenge the jurisdiction of the Court, claiming there was a plain, adequate and complete remedy at law; that there was no equity in the bill; that action was premature and that the necessary jurisdictional amount was not involved. These in their order.

It is fundamental that equity cannot give relief where there is a plain, adequate and complete remedy at law. It is provided by the Federal Judicial Code, Compiled Stat. 1918, Section 1244 as follows:

"Suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law. (R. S. Sec. 723. March 3, 1911, c. 231, Sec. 267, 36 Stat. 1163.)"

It must be a remedy as certain, complete, prompt and efficient to attain the ends of justice as that in equity. Monmouth Inv. Co. et al. vs. Means, 80 C. C. A. 527; McMullen Lumber Co. vs. Strother et al., 69 C. C. A. 433; Morgan vs. Beloit, City

and Town, 74 U. S. 613; McConihay vs. Wright, 121 U. S. 201; Tyler vs. Savage, 143 U. S. 79; Boise Artesian Hot and Cold Water Company vs. Boise City, 213 U. S. 276; Greene, Auditor, et al., etc., vs. Louisville & Interurban Railroad Co., 244 U. S. 499; Coler et al., vs. Board of Com'rs of Stanly County et al., 89 Fed. 257.

It must be a remedy on the law side of the Federal Court. A remedy in the State Court that can not be pursued in the Federal Court is not an adequate remedy. Sheffield Furnace Co. vs. Witherow, 149 U. S. 574; Smyth vs. Ames, 169 U. S. 466, 516; United States Life Ins. Co. in City of New York vs. Cable, 98 Fed. 761; Brun et al. vs. Mann, 151 Fed. 145.

The question is, has party the adequate remedy at law in the Federal Court?

In Reagan vs. Farmers' Loan and Trust Co., 154 U. S. 362, 391, the Court said:

"Nor can it be said in such a case that relief is obtainable only in the courts of the State. For it may be laid down as a general proposition that, whenever a citizen of a State can go into the courts of a State to defend his property against the illegal acts of its officers, a citizen of another States may invoke the jurisdiction of the Federal courts to maintain a like defence. A State cannot tie up a citizen of another State,

having property rights within its territory invaded
260 by unauthorized acts of its own officers, to suits for re-
dress in its own courts. Given a case where a suit can
be maintained in the courts of the State to protect property
rights, a citizen of another State may invoke the jurisdiction
of the Federal Courts."

It has been held that where the State statute provided an action at law against the county for the recovery of sums paid on account of invalid taxes that the same constitutes a plain, speedy and adequate remedy at law. Union Pac. R. Co. vs. Board of Com'rs of Weld County, Colo., 217 Fed. 540. The Supreme Court of the United States has held that the North Dakota statute permitting actions respecting title of the property or accruing on contract to be brought against the State the same as against a private person does not clearly allow an adequate remedy; and there, injunction restraining defendants from taking steps to enjoin certain taxes, was upheld. Wallace et al. vs. Hines, Director General of Railroads, et al., 253 U. S. 66. There was no such proceeding as discussed in Union Pac. R. Co. vs. Board of Com'rs of Weld County, Colo., *supra*, in the South Dakota statutes.

The only remedy was to appear before the Board of County Commissioners (claimed by appellees to be acting without authority,) and then appeal from their finding to the State Court. Such was not the adequate remedy contemplated by the Federal statute.

While the frequent exercise of equity jurisdiction is in staying the collection of taxes illegal in whole or in part, a suit in equity will not lie to restrain the assessment or collection of a tax on the sole ground that it is illegal. There must be special circumstances bringing the case under some recognized head of equity jurisdiction. The right to such equitable relief must be clear where it is asked to restrain the collection of a State tax.

In *Hannewinkle vs. Georgetown*, 15 Wall. 547, 548, it is said:

"It has been the settled law of the country for a great many years, that an injunction bill to restrain the collection of a tax, on the sole ground of the illegality of the tax, cannot be maintained. There must be an allegation of fraud; that it creates a cloud upon the title; that there is apprehension of multiplicity of suits or some cause presenting a case of equity jurisdiction."

In *Union Pacific Railway Company vs. Cheyenne*, 113 U. S. 516, 525-526, the rule is clearly laid down by the
261 Court:

"It cannot be denied that bills in equity to restrain the collection of taxes illegally imposed have frequently been sustained. But it is well settled that there ought to be some equitable ground for relief besides the mere illegality of the tax; for it must be presumed that the law furnishes a remedy for illegal taxation. It often happens, however, that the case is such that the person illegally taxed would suffer irremediable damage, or be subject to vexatious litigation, if he were compelled to resort to his legal remedy alone. For example, if the legal remedy consisted only of an action to recover back the money after it had been collected by distress and sale of the tax-payer's lands, the loss of his freehold by means of a tax sale would be a mischief hard to be remedied. Even the cloud cast upon his title by a tax under which such a sale could be made, would be a grievance which would entitle him to go into a court of equity for relief. Judge Cooley fairly sums up the law on this subject as follows: 'To entitle a party to relief in equity against an illegal tax, he must by his bill bring his case under some acknowledged head of

equity jurisdiction. The illegality of the tax alone, or the threat to sell property for its satisfaction, cannot, of themselves, furnish any ground for equitable interposition. In ordinary cases a party must find his remedy in the courts of law, and it is not to be supposed he will fail to find one adequate to his proper relief. Cases of fraud, accident or mistake, cases of cloud upon the title to one's property, and cases where one is threatened with irremediable mischief, may demand other remedies than those the common law can give, and these, in proper cases, may be afforded in courts of equity.' This statement is in general accordance with the decisions of this court as well as of many State Courts."

See also Dows vs. City of Chicago, 78 U. S. 108; State Railroad Tax Cases, 92 U. S. 575; Ogden City vs. Armstrong, 168 U. S. 224; Pittsburgh &c Railway vs. Board of Public Works of W. Va., 172 U. S. 32; Singer Sewing Mach. Co. vs. Benedict, 229 U. S. 481; Ohio Tax Cases, 232 U. S. 576.

In Keokuk & Hamilton Bridge Co. vs. Salm et al., 258 U. S. 122, the alleged invalidity consisted in discriminatory overvaluation. There was no claim of absolute illegality in the assessment. Appellant had a remedy with the Board of Review to correct the assessment, and the court said that resort to the suit to prevent either a sale for an illegal tax creating a cloud upon title or other irreparable injury had no basis.

262 In Union Pacific R. Co. vs. Board of Com'rs of Weld County, 217 Fed. 540, this Court said with reference to the casting of a cloud upon real property creating an "equitable circumstance" that the remedy which the statute prescribes will dissipate any such cloud and says, "Those cases which hold that a cloud upon the title to real property affords a ground for equitable relief are not applicable, when the taxpayer is given the remedy of paying his taxes and recovering back any sum which the courts shall hold to have been illegally exacted." There is no such provision in the South Dakota statute.

In Boise Artesian Hot and Cold Water Company vs. Boise City, 213 U. S. 276, it was held that equity should not enjoin the collection of a tax on the ground of cloud on title when the tax can only be collected in suit at law in which the defense of its illegality is open, and further it not appearing that the tax is a lien on any of complainant's property.

In Indiana Manufacturing Co. vs. Koehne, 188 U. S. 681, certain assessments upon shares of stock in a corporation

were involved. The Court found that as there was no lien created on real estate there was no cloud on title.

It is well settled that an assessment that will put a cloud on title gives rise to equitable jurisdiction unless there is an adequate remedy at law. *Union Pacific Railway Co. vs. Cheyenne*, 113 U. S. 516; *Greene, Auditor, et al., etc., vs. Louisville & Interurban Railroad Company*, 244 U. S. 499.

Section 8463 of the South Dakota Statutes provides for the Board of County Commissioners fixing the proportion of benefits of proposed drainage among the lands affected.

Section 8464 provides for the Board making an assessment against each tract and property affected, and this is collectible by the Treasurer's office. Clearly the assessment would create a cloud upon the title. Fixing the proportion of benefits being preliminary to the assessment and a part of the machinery of assessment, likewise, we think, creates a cloud upon the title and gives equity jurisdiction. *Shelton vs. Platt*, 139 U. S. 591; *Ohio Tax Cases*, 232 U. S. 576; *Hopkins et al. vs. Walker et al.*, 244 U. S. 486.

Was the case prematurely brought? It is claimed that inasmuch as the Board of County Commissioners had not assessed the taxes complained of consequently the suit is premature.

263 In *Western Union Telegraph Co. vs. Howe et al.*, 180 Fed. 44, it was held by this court that the suit was prematurely brought because the Telegraph Company did not pursue the remedy afforded by law to have its assessment corrected by the State Board of Equalization. That was not a case, however, where it was claimed that the entire proceedings were without authority and illegal, as is the case here. The jurisdiction to act was not questioned.

In *Keokuk & Hamilton Bridge Co. vs. Salm et al.*, 258 U. S. 122, the question involved was the amount of the tax. It was not claimed that the proceedings were illegal.

In the late case of *Milheim et al. vs. Moffat Tunnel Improvement District et al.*, 262 U. S. 710, there was no question of jurisdiction of the taxing body as there is here. Plaintiff's property was by legislative act placed within the taxing district.

The proceeding here involved, being without authority, the situation is quite different from where the only question involved is the inequality of taxes levied by a board having

jurisdiction to act. The actions, we are satisfied, were not premature.

Appellants urgently insist that it does not appear from the record that the amount in controversy, exclusive of interest or costs, exceeds the sum or value of three thousand dollars, and that the statements in the various complaints of appellees so alleging are false, and stated with the fraudulent purpose of imposing upon the jurisdiction of the Federal Court; that no tax has in fact been assessed; that the apportionment of benefits is tentative and subject to correction, and that there is no way of determining what the amount of the assessment against the respective appellees would have been had the proceedings not been interrupted by the injunctions; and that there is in fact no sum whatsoever in controversy between the parties hereto.

It has been held that future, undetermined, unaccrued or unspecified taxes cannot be taken into consideration to give jurisdiction; that the court cannot engage in speculation as to such taxes. Holt vs. Indiana Manufacturing Company, 176 U. S. 68; New England Mortgage Security Co. vs. Gay, 145 U. S. 123; Citizens' Bank vs Cannon, 164 U. S. 319; Washington and Georgetown R. R. Co., vs. District of Columbia, 146 U. S. 227; also that where there is a suit to enjoin collection of a tax the amount of the tax is the test of jurisdiction. Linehan Ry. Transfer Co. vs. Pendergrass, 70

264 Fed. 1; Eachus vs. Hartwell et al., 112 Fed. 564; Washington and Georgetown R. R. Co., vs. District of Columbia, 146 U. S. 227; Board of Trustees of Whitman College vs. Berryman et al., 156 Fed. 112; Citizens' Bank vs. Cannon, 164 U. S. 319; City of Ottumwa, Iowa, vs. City Water Supply Co., 119 Fed. 315.

It has also been held that where the complaint alleges the amount in controversy to equal the jurisdictional requirement and the contrary does not appear to a certainty from the evidence, that the jurisdiction will be sustained. Maffet vs. Quine, 95 Fed. 199; Von Schroeder vs. Brittan, 93 Fed. 9.

What is the situation here? Each one of the appellees is threatened with an assessment of more than three thousand dollars. The Northern States Power Company is threatened with one of fifty thousand dollars. And further, certain appellees who have no property within the original Drainage Districts No. 1 and No. 2 are brought into the district and made liable to future assessments for maintenance and repair of ditches. It appears from the record that the Board of Coun-

ty Commissioners had fixed against the different appellees the proportion of benefits on a unit basis. It is without question that the County Commissioners have issued approximately \$255,000.00 worth of warrants for this work, and that the amount due thereon is about \$300,000.00. It is a matter then of mere mathematical calculation to arrive at the threatened assessment against each one of appellees.

Exhibit "C" is the notice to the various parties against whom proportions of benefits have been fixed. It provides as follows, to-wit: "All such owners and all persons interested are hereby notified and summoned to show cause at the time and place aforesaid why the proportion of benefits shall not be fixed as stated, and the said determination of said Board made final." If no action whatever were taken by appellees the amounts would be final, and under these circumstances we believe the amount in dispute in each case exceeds the jurisdictional requirement. The claim of amount is evidently made in good faith, and not for the mere purpose of giving the Federal Courts jurisdiction. We do not believe that where the Board has passed a resolution fixing benefits which exceed the jurisdictional amount and are the basis of a proposed assessment, and which parties claim are fixed by the Board without authority, that because said Board may equalize the benefits or even find that no benefit exists the parties must wait until the final action of the Board. It is suggested that the Board may so equalize benefits that the jurisdictional amount will not be involved, but as the matter stood when the case was brought each appellee was threatened with the levying of a tax for more than the jurisdictional amount, and some of the necessary steps had already been taken.

As the proportion of benefits had been fixed subject to change by the Board only if appellees should convince them that their conclusion was erroneous, and in view of the claim in apparent good faith in each of the bills that the amount involved exceeded the jurisdictional amount, we hold, from a careful survey of the entire record, that the necessary amount existed in each case to give jurisdiction to the Federal Court.

All bills of complaint raise questions under the Federal Constitution that are substantial and not merely colorable. Hence the Court has jurisdiction exclusive of diversity of citizenship, which existed as to all appellees except the City of Sioux Falls, necessary amount being involved, to determine all questions in the record, and it has not lost jurisdiction by omitting to decide the constitutional ones. Siler et al., etc.

vs. Louisville & Nashville R. R. Co., 213 U. S. 175; Ohio Tax Cases, 232 U. S. 576; Louis. & Nash R. R. Co. vs. Finn, 235 U. S. 601; Greene, Auditor, et al., etc., vs. Louis. & Interurban R. R. Co., 244 U. S. 499.

Appellants plead estoppel against all of the appellees, and claim that appellees are not in position to maintain their actions, for the reason that as to some of the railroad companies the engineering departments have been in close touch with the drainage ditch proceedings; that some of them were assessed for benefits received upon the construction of the original drainage ditches in the same territory, received benefit thereby, and have not protested before the bringing of this action. As to some of the appellees it is claimed that their officers showed interest in the construction work and encouraged the Board of Commissioners to do the work; that some of the appellees, for instance, the Chicago, Milwaukee & St. Paul Railway Company, hauled men and materials used in the construction work, and stopped trains between stations to unload men and materials. As to the City of Sioux Falls, it is claimed by way of estoppel, that under due authority the Mayor and City Auditor signed the petition for the project.

There can certainly be no just claim of estoppel as to 266 those appellees whose property was not within the area of the original Drainage Ditch No. 1 and No. 2. As to the other appellees, the decree related only to the property outside of the original assessment areas of Drainage Ditch No. 1 and No. 2. So we are to consider the situation as bearing on the question of estoppel only as to the property outside of the original assessment areas up to the time of the notice of the fixing of benefits. The various appellees as to such property had no notice when the acts constituting the alleged estopped took place, that the same was to be affected by the drainage construction or would be assessed for the cost thereof. Hence the claimed acts of agents and officers of appellees would not constitute estoppel. The situation is quite different from that presented in Gilseth vs. Risty, 193 N. W. 132—at least as to all appellees except the City of Sioux Falls. We do not pass on the question of estoppel as to any appellees, as to assessments that may be made on their property within the original area of Ditch No. 1 and Ditch No. 2, for the purpose of maintaining such ditches.

Other questions are presented which we think are not involved in the determination of these cases. The decree of the trial court in each case is affirmed.

Filed March 18, 1924.

267

(Decree.)

United States Circuit Court of Appeals, Eighth Circuit.

December Term, 1923.
Tuesday, March 18, 1924.

A. G. Risty, et al., as County Commissioners of Minnehaha County, South Dakota, defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al., intervening defendants, Appellants,

No. 6312. vs.

Chicago, Rock Island and Pacific Railway Company, a corporation.

Appeal from the District Court of the United States for the District of South Dakota.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of South Dakota, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby, affirmed with costs; and that the Chicago, Rock Island and Pacific Railway Company, a corporation, have and recover against A. G. Risty, et al., as County Commissioners of Minnehaha County, South Dakota, defendants, and Minnehaha National Bank of Sioux Falls, South Dakota, et al., for intervening defendants, the sum of Twenty Dollars for its costs herein and have execution therefor.

March 18, 1924.

268 (Petition for Appeal to Supreme Court, U. S., Assignment of Errors and Allowance of Appeal.)

(Petition for Appeal and Allowance thereof.)

To the Honorable Presiding Justice, or any of the Judges of the Circuit Court of Appeals of the United States, for the Eighth Circuit.

Now comes the above named appellants, by their solicitors, and complain that in the record and proceedings, and also in the rendition of the Decree of the United States Circuit Court of Appeals, for the Eighth Circuit, sitting at St. Louis, in the State of Missouri, in the above styled and numbered cause, on the 18th day of March, A. D., 1924, affirming the Decree of

the United States District Court, for the District of South Dakota, Southern Division, in said cause, manifest error has intervened, to the great damage of the petitioners. In substance, said errors are these:

1. Appellee was given said relief by collateral attack, by means of a Bill of Equity, when it had an adequate remedy at law which it could pursue, at its election, either in the Courts of the State of South Dakota, or in the Federal Court.

2. It was given the relief aforesaid, despite the fact that the record shows without dispute that the appellants, the Board of County Commissioners, in establishing the said new project, and in attempting to obtain said contribution from appellee, acted strictly in accord with the statutes of the State of South Dakota governing the establishment of such new project.

3. Appellee got said relief, though, in addition to the fact that the said Board had in fact thus complied with said statutes of the State of South Dakota, it was the settled law of said State at the time the Circuit Court of Appeals
269 acted as aforesaid, that the doings of said Board with reference to the aforesaid project were in compliance with the statutes of South Dakota, as construed by the highest court of that State. It was further settled at said time by the highest court of the State of South Dakota, that the very project at bar was the formation of a new drainage district, or ditch. And the Circuit Court of Appeals erred in disregarding the interpretation of the applicable statutes of the State of South Dakota as formulated by the highest court of that State, and substituting its own interpretation for that of said highest court of that State.

4. The Circuit Court of Appeals erred in granting the relief which it did grant and affirm, because neither the pleadings nor the evidence warranted such relief, or any relief, and because its finding that appellee was entitled to the relief which it obtained, is contrary to the pleadings and to the evidence, and contrary to and unwarranted by the law.

5. Said Circuit Court of Appeals erred also for the reasons set out in the assignments of error filed herewith.

The appellee invoked the jurisdiction of said United States District Court, as set out in its bill of complaint, on the ground that it, the appellee, was a citizen of the State of Illinois; that the appellants were citizens of the State of South Dakota, and that more than \$3,000.00, besides costs, was actu-

ally in controversy. It did not invoke the jurisdiction solely on the aforesaid grounds, but, in addition, asserted in its bill of complaint that appellants were not proceeding in accordance with the requirements of the applicable statutes of the State of South Dakota; that if it were assumed they were acting in compliance with said statutes, such statutes themselves were unconstitutional and void, and violative of the Constitution of the United States, and amendments thereto, and that the action of appellants was depriving appellee of its property without due process of law, in violation of said Constitution and amendments thereto.

Therefore, your appellants and petitioners say that this cause and matter is not one in which the decision of the said Circuit Court of Appeals of the United States is made final, and say further that the controversy between appellants and appellee involves an actual controversy over more than One Thousand Dollars besides costs.

Wherefore, petitioners pray for an allowance of the appeal, to the end that the cause may be carried to the Supreme Court of the United States, and petitioners pray for a supersedeas of said judgment, and such other process as is required to perfect the appeal prayed for, to the end that the errors therein may be corrected.

BENJ. I. SALINGER,
ELBERT O. JONES,
NORMAN B. BARTLETT,
Solicitors for Appellants.

Appeal and supersedeas allowed, and bond fixed at the sum of One Thousand and no/100 Dollars (\$1000.00), conditioned as the law provides, this 31 day of May, A. D., 1924.

WM. S. KENYON,
Judge of the Circuit Court of Appeals of the United States, for the Eighth Circuit.

Assignments of Error.

Now on this 31 day of May, 1924, comes A. G. Risty, et al., as County Commissioners, etc., et al., Appellants, by their solicitors, Benj. I. Salinger, Elbert O. Jones and Norman B. Bartlett, and in connection with their petition for appeal to the Supreme Court of the United States, say that in

271 the Findings, Judgment and Decree entered in the above cause on the 18th day of March, 1924, manifest

error has intervened, to the injury, wrong and prejudice of these appellants, and that the same is erroneous and unjust to appellants;

1. Because the Circuit Court of Appeals failed to follow the construction of the South Dakota Constitution and Statutes as pronounced by the highest court of the State, and did its own construing of said State law, and based its affirmance of the Decree of the District Court on a construction on its own part, which is in conflict with the construction of the highest court of the State.

2. Because it was based on the reasoning that appellant Board had no authority to make an assessment, except in aid of a drainage project to drain agricultural lands, and that said Board had no authority in law to establish a drain, except for the drainage of agricultural lands.

This is erroneous, and the interpretation of the Constitution and Statutes by the Circuit Court of Appeals is erroneous, because it is, and for a long time has been, the settled law of South Dakota, as declared by the highest court of the State in construing its said Constitution and statutes, that a Board such as appellant Board is, is, by such Constitution and statutes, authorized to establish and construct a drain for a public purpose, and that such public purpose included, but was not limited to, the drainage of agricultural lands, and that such authority existed as to such drainage as the very one at bar is, and it is undisputed in the evidence that one object of this project was to drain agricultural lands.

3. Because it is not only a fact that the highest court of the State has ruled, in construing the Constitution and Statutes of the State of South Dakota, that the drainage ditch at bar was lawfully established, and that the acts of appellant Board were lawful, but the record shows both facts without dispute; and the Circuit Court of Appeals' affirmance is despite such ruling and despite said state of the evidence.

4. Because there is no evidence in the record to show any fraud or subterfuge on behalf of the appellant Board, or anyone at all, in the establishment of this new drainage ditch, and there is absolutely no evidence in the record that appellee was prevented from making a full and fair defense to such establishment in the proceedings had upon notice given by the appellant Board, by which this new drainage ditch was established. Unless appellee was by some subterfuge pre-

vented from making a full defense to the establishment of this project at the time of its establishment, the mere statement now that it was established by suberfuge, is of no avail to it in this collateral attack.

5. Because the affirmance was based on an interpretation of the statutes of South Dakota by the Circuit Court of Appeals that such statutes did not permit or authorize appellant Board of County Commissioners to establish and construct a new drainage ditch over the line of two older ditches, which new project contained a materially larger area than the combined areas of such old ditches, and called for cleaning out, widening, deepening and diking of the older ditches, to double their former capacity, the construction of river cut-offs to accelerate the flow of water therein, and the installation of a new and larger spillway, all at a cost of more than double the cost of the original ditches; which interpretation was contrary to the interpretation given to such statutes by the highest court of the State of South Dakota in this very drainage project.

6. Because the statutes of South Dakota, as interpreted by the highest court of the State, permit and authorize 273 the appellant Board to establish over the line of one or more old drainage ditches, a new drainage project, containing a materially larger drainage area than the combined area of such old ditches, with additional river cut-offs, new and larger spillway, and a cleaning out and deepening, widening and diking of the old ditches, to double their former capacity, at an expense of more than double the cost of the original ditches; and the undisputed evidence in this case shows the proceedings of the appellant Board sufficient under such statutes to establish and construct such new drainage project, and make an apportionment of benefits for the payment of the cost thereof, and did not warrant the finding and conclusion of said Circuit Court of Appeals that said proceedings were in fact for repair and maintenance, only.

7. Because it is based on the holding and reasoning that appellant Board had acted without authority from, and had not complied with, the provisions of the statutes of South Dakota, regulating the maintenance and repair of ditches already established. The appellees, City of Sioux Falls, Chicago, Milwaukee & St. Paul Railway Company and the Chicago, St. Paul Minneapolis & Omaha Railway Company, conceded that the project at bar was the creation of a new ditch and a new project. That fact is established by the undisputed

evidence as against all of the appellees. It is undisputed in the evidence that there was a full compliance with every statute dealing with the establishment of a new ditch. Therefore, the affirmance was given because there had been a failure to comply with statutes that had nothing whatever to do with the establishment of a new ditch, or assessing for the cost of its construction. The court disregarded that the relevant statutes had been complied with and based its action wholly on the fact that statutes that had no application had not been complied with.

8. Because the appellant Board to whom had been delegated by the statutes of South Dakota the authority
274 to determine the purpose and character of this drainage project had, after notice and hearing, determined that this drainage project, among other things, was for the benefit of the public health, welfare and convenience, and was necessary and practicable for draining agricultural lands, from which determination no appeal was ever taken; and the highest court of the State of South Dakota has held in interpreting such statutes, that such determination is final, no appeal from the same ever having been taken.

9. Because the notice dated September 15, 1916, and the hearing held pursuant thereon, on October 2, 1916, was a notice to, and an opportunity to be heard by appellee on the formation of this new drainage project with an enlarged area subject to benefits, and that appellee's property was included therein, and gave to it its day in court, and its opportunity to contest the establishment of said drainage project, the legality thereof, the necessity therefor, the character and purpose thereof, and it having waived the same and defaulted therein, and not having appealed from said determination, is bound thereby.

10. Because what was in effect done was to restrain legislative action on the part of the appellant Board acting in a legislative capacity under delegation from the legislature of the State. The Legislature itself could have, by enactment of a statute, done everything the Board did, or was proposing to do, and it should be conceded that the legislature could not have been enjoined from enacting such a statute. The only difference is that the Board was bound to give certain notices and hearings before any assessment could become a lien, and the Board did what it was bound to do.

11. Because the proceedings at bar were proceedings in rem, for the purposes of taxation, and dealing in this matter,

275 or any review of the same, involves property rules over which the courts of the State are the final authority and both resident and non-resident property owners must, at least in the first instance, resort to and exhaust the remedies provided by the statute in the state tribunals for reviewing such controversies before they may enter either th State or the Federal Courts at all.

12. Because, although where a resident of a state may enter the courts of a state, one who has diversity and a controversy involving more than \$3,000.00 need not submit himself to those state courts, but may at his election enter the federal courts, yet in a proceeding in rem, like a drainage project, the resident of the State must first submit to administrative review, and may not enter the courts of his State without first exhausting such administrative review, and the non-resident cannot disregard such administrative review and have his proceedings in rem reviewed in the first instance in the federal courts. The non-resident can enter the federal court only when the resident of the State can enter the state court.

13. Because the injunction was granted on the reasoning that one should not be compelled to appear at the hearing to equalize apportionments, for the reason that it would be had before said Board, and said Board had no authority whatever to act; that one should not be compelled to submit to a hearing before a mere trespasser. This disregards, first, that the mere assertion that the Board was without authority did not justify the failure to appear at said hearing, and, second, it disregards the decisions of the highest court of the State that the Board was acting on full authority, and, third, it appears by the undisputed evidence that they had full authority.

14. Because the hearing enjoined was one to be had for the purpose of equalizing a tentative estimate, only, 276 which had been made by the appellant Board. This estimate was not final, and additional acts by the Board were necessary after such hearing was held before any tax, assessment or servitude could become operative. Manifestly the holding of such hearing could not give rise to a multiplicity of suits as against these appellees, no matter how many suits might arise as to other parties. Manifestly the proposal to hold such hearing [hearing] cast no cloud on title, because other acts by the Board were necessary before any amount that was finally fixed could become a tax, assessment or servitude upon its property, and there was no evi-

dence at all that there would result irreparable injury to appellee. This is especially applicable to the appellee City of Sioux Falls, and to the four railway company appellees, because even if an assessment had been made and a tax levied it would have created no lien upon their property.

15. Because appellee made no case under any acknowledged head of equity jurisdiction, and, in the essence, based its claim for relief upon the assertion that it was threatened with exaction of an illegal tax. At any rate, there could be no right to have equitable relief until such time, if ever, as the threatened tax was about to be collected by taking from appellee the title to the lands affected by the assessment. Up to that time, nothing could happen more than to exact a sum of money for taxes which were illegal taxes, and for that wrong, or threatened wrong, the law provided an adequate remedy either in the state or federal courts.

16. Because, if, as is contended by the Circuit Court of Appeals, the appellants acted utterly without authority of law, and were therefore naked trespassers, that fact gave appellee an adequate remedy at law in either the federal or state courts, at their election, to-wit: to sue in trespass—hence appellee's bill in chancery should not have been entertained. If, on the other hand, the acts of the appellants were in all respects lawful, the appellee was not entitled to any
277 remedy, either at law or in equity.

17. Because, assuming that appellee could enter the federal court at all, it had at all times a plain, adequate and complete remedy at law in the premises in said courts, by appealing from the establishment of the ditch to the Circuit Court of the State, and thence removing the entire controversy involved, including the making of assessments, to the law side of the federal courts, where a trial de novo could be had. Instead, appellee lodged a bill of complaint seeking an injunction.

And while it may be true appellee has waived its right to this appeal from the establishment of the ditch, that does not alter the fact that it had no right to enter a court of equity on the ground that though it had at one time the right to thus appeal to and have review in the federal court and a trial de novo there on the law side, by its default and waiver, it had voluntarily lost that right.

The right to enter chancery cannot be created by waiving or failing to exercise an adequate remedy at law.

Passing that, the appellee had the right to appeal from the action of the appellant Board as to apportionment of benefits directly to the Circuit Court of the State, and thereupon to remove this very controversy for review on the law side of the Federal District Court, and there have a trial de novo.

18. Because, assuming for the sake of the argument, that the District Court and the Circuit Court of Appeals had authority to pass upon the merits, both of them erred in finding for the appellee, in that there is absolutely no evidence to support the contention of the appellee on the merits, that is to say, there is no evidence whatever that the appellant Board ever did anything whatsoever in the premises other than what it was authorized to do by the Constitution and 278 statutes of the State of South Dakota. And, in addition

to this being the state of the evidence, the highest court of the State, construing said Constitution and statutes of the State, has ruled in a way that is binding upon said federal courts, that in truth and in fact, appellants acted on full authority, and in every way in compliance with the requirements of said Constitution and statutes of the State of South Dakota.

19. Because appellee was not entitled to any relief for the reason that it was given legal notice by the notice dated September 15, 1916, of the proposed formation of this new drainage project, containing an enlarged benefited area, which was about to be established, and that its property was included therein, and that appellee was granted a hearing upon such facts on October 2nd, 1916, and appellee waived such hearing, with full knowledge that it was bound by all subsequent action of the appellant Board which necessarily followed in the premises; and, in addition thereto, appellee stood by, and without any objection on its part to said proceedings, saw the expenditure of over a quarter of a million dollars, for the payment of which appellee is charged with knowledge that the same must be made out of the property benefited, included in which class is appellee's, and in addition thereto, appellee actively aided and abetted said work as the same progressed, and made no protest, and it is now estopped from questioning the legality of said proceedings.

Wherefore, appellants pray that the said Findings, Judgment and Decree of the said Circuit Court of Appeals be reversed, and that such further orders and proceedings be had as law and justice may require, and that this case may be

remanded, and such relief given to appellants as may be their due.

BENJ. I. SALINGER,
ELBERT O. JONES,
NORMAN B. BARTLETT,
Counsel for Appellants.

279 (Endorsed): Filed in U. S. Circuit Court of Appeals,
May 31, 1924.

(Bond on Appeal to Supreme Court, U. S.)

Know All Men By These Presents:

That we, A. G. Risty, et al., as County Commissioners, etc., et al., Appellants, as principals, and the Southern Surety Company, of Des Moines, Iowa, as surety, acknowledge ourselves to be jointly indebted to the Chicago, Rock Island and Pacific Railway Company, (a corporation) Appellee, in the above cause, in the sum of One Thousand Dollars (\$1,000.00), conditioned that, whereas, on the 18th day of March, A. D. 1924, in the Circuit Court of Appeals of the United States, for the Eighth Judicial Circuit, in a suit pending in that Court upon appeal, wherein the Chicago, Rock Island and Pacific Railway Company, a corporation, was plaintiff and appellee, and A. G. Risty, et al., as County Commissioners, etc., et al., were defendants and appellants, numbered on the Docket as No. 6312, a Decree was rendered against the said A. G. Risty, et al., as County Commissioners, etc., et al., appellants, and the said A. G. Risty, et al., as County Commissioners, etc., et al., having obtained an appeal to the Supreme Court of the United States, and filed a copy thereof in the office of the Clerk of this Court, to reverse the said Decree, and a citation directed to the said appellee, citing and admonishing it to be and appear at a session of the United States Supreme Court, to be held in the City of Washington, D. C.;

Now if the said A. G. Risty, et al., as County Commissioners, etc., et al., shall prosecute their appeal to effect, and answer all costs if they fail to make their plea good, then
280 the above obligation to be void, else to remain in full force and virtue.

A. G. RISTY,
Signing for all the Appellants.
Principals.

(Seal)

SOUTHERN SURETY COMPANY OF DES MOINES, IA.,
By H. B. Charnock, Attorney-in-Fact.

Surety.

The foregoing bond is hereby approved.

May 31, 1924.

WM. S. KENYON,
Judge of the United States Circuit
Court of Appeals, for the Eighth Cir-
cuit.

(Certified copy of Power of Attorney issued to Mr. H. B. Charnock by the Southern Surety Company of Des Moines, Iowa, etc., attached to original bond.)

(Endorsed): Filed in U. S. Circuit Court of Appeals,
May 31, 1924.

281 Citation.

Citation.

United States Circuit Court of Appeals, Eighth Circuit.

A. G. Risty et al. as County Commissioners, et al., Appellants,
No. 6312. vs.

Chicago, Rock Island and Pacific Railway Company, a corporation, Appellee.

United States of America, To Chicago, Rock Island and Pacific Railway Company—Greeting:

You are hereby notified that in a certain case in equity in the United States District Court in and for the Southern Division, District of South Dakota, wherein the Chicago, Rock Island and Pacific Railway Company, a corporation, is complainant and A. G. Risty et al. as County Commissioners et al. are defendants, and in which case the said defendants perfected an appeal to the Circuit Court of Appeals, Eighth Circuit, an appeal has been allowed to the said A. G. Risty et al. to the United States Supreme Court. You are hereby cited and admonished to be and appear in said court at Washington, D. C. sixty days after the date of this citation to show cause, if any there be, why the order and decree appealed from should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable William S. Kenyon, Judge of the United States Circuit Court of Appeals, Eighth Circuit, this 31st day of May, A. D. 1924.

WM. S. KENYON,
Judge of the United States Circuit
Court of Appeals, Eighth Circuit.

Service of the within Citation this 2nd day of June, A. D., 1924, at Sioux Falls, South Dakota, is hereby acknowledged.

O'BRIEN, HORNE & STRINGER,
BOYCE, WARREN & FAIRBANK,
Counsel for Appellee.

(Endorsed): U. S. Circuit Court of Appeals, Eighth Circuit. No. 6312. A. G. Risty, et al., as County Commissioners, etc., et al., Appellants, vs. Chicago, Rock Island & Pacific Railway Company. Citation on Appeal to Supreme Court, U. S., and acknowledgment of service. Filed Jun. 5, 1924, E. E. Koch, Clerk.

282 (Praecipe for Transcript an Appeal to Supreme Court, U. S.)

The Clerk of the above named Court is hereby directed to prepare and certify a transcript of record in the above entitled case for the use of the Supreme Court of the United States by including therein the following:

1. The printed transcript of record filed in your court.
2. Appropriate reference to the hearing held at St. Louis in the Circuit Court of Appeals.
3. The opinion of the Circuit Court of Appeals in this cause except the title thereof.
4. The decree of the Circuit Court of Appeals, except the title thereof.
5. Petition for appeal and order allowing the same, except the title thereof.
6. Assignments of error.
7. The bond on appeal and approval, except the title, and the powers of attorney, verification and authentication which may be shown by sufficient memoranda.
8. Citation in appeal and admission of service thereof.
9. Memoranda as to the praecipe filed.
10. Clerk's certificate.

Dated at Sioux Falls, South Dakota, this 3 day of June, 1924.

BENJ. I. SALINGER,
ELBERT O. JONES,
NORMAN B. BARTLETT,
Counsel for Appellants.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Jun. 5, 1924.

283

(Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of South Dakota as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of the pleadings, record entries and proceedings, including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, prepared in accordance with the praecipe of counsel for appellants, in a certain cause in said Circuit Court of Appeals wherein A. G. Risty, et al., as County Commissioners, etc., et al., were Appellants and the Chicago, Rock Island and Pacific Railway Company was Appellee, No. 6312, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that the original citation with acknowledgment of service endorsed thereon is hereto attached and herewith returned.

(Seal)

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this sixth day of June, A. D. 1924.

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 30,416. U. S. Circuit Court Appeals,
8th Circuit. Term No. 451. A. G. Risty et al., as county commissioners,
et al., appellants, vs. Chicago, Rock Island and Pacific Rail-
way Company. Filed June 16th, 1924. File No. 30,416.

(4401)